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In the Supreme Court of the United States

October Term, 1973

FRIENDS OF THE EARTH, WASATCH MOUNTAIN CLUB, INC., and KENNETH G. SLEIGHT,

Petitioners,

v.

GILBERT R. STAMM, Commissioner, Bureau of Reclamation, and ROGERS C. B. MORTON, Secretary of the Interior,

Respondents,

and

STATE OF COLORADO, STATE OF UTAH, COLORADO RIVER WATER CONSERVATION DISTRICT, SOUTHWESTERN WATER CONSERVATION DISTRICT, INTER-MOUNTAIN CONSUMER POWER ASSN., NORTHERN DIVISION POWER ASSN., INC., CENTRAL UTAH WATER CONSERVANCY DISTRICT, and COLORADO-UTE ELECTRIC ASSOCIATION,

Intervenors-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OWEN OLPIN
College of Law
University of Utah
Salt Lake City, Utah 84112

JAMES B. LEE
CONSTANCE K. LUNDBERG
of and for
PARSONS, BEHLE
& LATIMER
79 South State Street
Salt Lake City, Utah 84111

CHRIS WANGSGARD
of and for
VAN COTT, BAGLEY,
CORNWALL & McCARTHY
141 East First South
Salt Lake City, Utah 84111

Attorneys for Petitioners

TABLE OF CONTENTS

Page

Subject Index

OPINIONS BELOW 2

STATEMENT OF JURISDICTION 2

QUESTION PRESENTED 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 11

A. Implied Repeal 11

B. Separation of Powers 17

C. National Parks and Monuments 18

APPENDIX A—Opinion of the District Court I

APPENDIX B—Opinion of the Tenth Circuit Court of Appeals LIII

APPENDIX C—Statutes Relied upon in Petition LXXXI

Table of Citations

CASES:

Committee for Nuclear Responsibility v. *Seaborg*, 463 F.2d 783 (D.C. Cir. 1971) 12, 15

Mathews v. *United States*, 123 U.S. 182 (1887) 12

Posadas v. *National City Bank*, 296 U.S. 497 (1936) 11, 12

United States v. *Dickerson*, 31 U.S. 554 (1940) 12

United States v. *Langston*, 118 U.S. 389 (1886) 12

United States v. *Vulte*, 233 U.S. 509 (1914) 12

TABLE OF CONTENTS—Continued

Page

FEDERAL STATUTES:

Civil Works Appropriation Acts:

74 Stat. 743 3
75 Stat. 722 3
76 Stat. 1216 3
77 Stat. 844 3
78 Stat. 682 3
79 Stat. 1096 3
80 Stat. 1002 3
81 Stat. 471 3
82 Stat. 705 3
83 Stat. 323 3
84 Stat. 890 3
85 Stat. 365 3

36 Stat. 2703 3
82 Stat. 896--899 14
16 U.S.C. § 3 18
16 U.S.C. § 5 18
16 U.S.C. § 796 18
28 U.S.C. § 1254 (1) 2
28 U.S.C. § 1361 9
30 U.S.C. § 181 18
42 U.S.C. §§ 4321-47 15
43 U.S.C. § 620 et seq. 4
43 U.S.C. § 620 ..... 3, 4, 5, 6, 7, 12, 13, 16
43 U.S.C. § 620(b) 2, 3, 4, 5, 6, 7, 9, 10, 13, 16, 17, 19

TABLE OF CONTENTS—Continued

Page

43 U.S.C. § 1501 et seq. 8, 13, 14, 16

43 U.S.C. § 1521 ..... 8, 14, 15, 16

43 U.S.C. § 1551 ..... 8, 14, 16

43 U.S.C. § 1552 ..... 8, 14, 16

LEGISLATIVE MATERIALS:

102 Cong. Rec. 5768 (1956) 6

107 Cong. Rec. 13920 (1961) 8

Hearings on H.R. 3300 and similar bills before the House Committee on Interior and Insular Affairs, 90th Cong., 1st Sess., Ser. 90-5, Pt. 1 at 338 16

Hearings on Public Works Appropriations for 1961 before a Subcommittee of the House Committee on Appropriations, 86th Cong., 2d Sess., Pt. 2 at 518 (1960) 6

Hearings on Public Works Appropriations for 1963 before a Subcommittee of the House Committee on Appropriations, 87th Cong., 2d Sess., Pt. 3 at 4-5 (1962) 7

H.R. 6255 (1973) 8

H.R. 9130 (1973) 18

S. 3180 (1960) 8

S. 175 (1961) 8

S. 1188 (1961) 8

S. 333 (1963) 8

S. 1555 (1967) 8

S. 307 (1969) 8

S. 1057 (1973) 8

S. 1981 (1973) 18

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GILBERT R. STAMM, Commissioner, Bureau of Reclamation, and ROGERS C. B. MORTON, Secretary of the Interior,

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STATE OF COLORADO, STATE OF UTAH, COLORADO RIVER WATER CONSERVATION DISTRICT, SOUTHWESTERN WATER CONSERVATION DISTRICT, INTER-MOUNTAIN CONSUMER POWER ASSN., NORTHERN DIVISION POWER ASSN., INC., CENTRAL UTAH WATER CONSERVANCY DISTRICT, and COLORADO-UTE ELECTRIC ASSOCIATION,

Intervenors-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The writ of certiorari is respectfully sought to the United States Court of Appeals for the Tenth Circuit in the matter of *Friends of the Earth, et al. v. Ellis L. Armstrong, et al., Nos.* 73-1223, 73-1278, 73-1279, 73-1280, 73-1281, 73-1282, 73-1283 (consolidated), 5 Environment Reporter Cases 1694 (10th Cir., Aug. 2, 1973).

OPINIONS BELOW

The opinion of the District Court for the District of Utah is reported as ***Friends of the Earth*** *v.* ***Armstrong***, 360 F. Supp. 165 (D. Utah 1973), and is appended hereto as Appendix A. The opinion of the Court of Appeals, which has not yet been officially reported, is reported unofficially as ***Friends of the Earth*** *v.* ***Armstrong***, 5 Environment Reporter Cases 1694 (10th Cir. Aug. 2, 1973), and is appended hereto as Appendix B.

JURISDICTION

The Court has jurisdiction to review this matter on writ of certiorari under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Is the decision of the United States Court of Appeals for the Tenth Circuit that Section 3 of the Colorado River Storage Act of 1956 (43 U.S.C. § 620(b)) has been impliedly repealed or rendered inoperative in conflict with applicable decisions of the United States Supreme Court and a violation of the doctrine of separation of powers?

STATUTES INVOLVED

The pertinent portions of Sections 1 and 3 of the Colorado River Storage Act of 1956 read as follows:

Section 1. . . . that as part of the Glen Canyon

> Unit the Secretary of the Interior shall take adequate protective measures to preclude impairment of the Rainbow Bridge National Monument. (43 U.S.C. § 620).
>
> Section 3. . . . it is the intention of Congress that no dam or reservoir constructed under the authorization of this Act shall be within any national park or monument. (43 U.S.C. § 620(b)).

The provisos (each of which is identical) contained in the public works appropriations acts for each year beginning with the 1961 Act and each year thereafter to and including 1972 read as follows:

> *Provided*, That no part of the funds herein appropriated shall be available for construction or operation of facilities to prevent waters of Lake Powell from entering any National Monument. (74 Stat. 743 (1960)[1]).

Pertinent provisions of the Colorado River Basin Project Act of 1968 are set out in Appendix C hereto.

STATEMENT OF THE CASE

Rainbow Bridge National Monument was established by Presidential Proclamation in 1910, less than a year after Rainbow Bridge was first seen by white men. (36 Stat. 2703 (1910)) It is the world's largest known natural stone arch, measuring 309 feet high and having a

[1] 74 Stat. 743 (1960), 75 Stat. 722 (1961), 76 Stat. 1216 (1962), 77 Stat. 844 (1963), 78 Stat. 682 (1964), 79 Stat. 1096 (1965), 80 Stat. 1002 (1966), 81 Stat. 471 (1967), 82 Stat. 705 (1968), 83 Stat. 323 (1969), 84 Stat. 890 (1970), 85 Stat. 365 (1971).

span of 278 feet. It is located in southern Utah on Bridge Creek, an intermittent tributary of the Colorado River. The National Monument boundaries encompass 160 acres of land around the bridge.

Glen Canyon Dam impounds the waters of the Colorado River in southeastern Utah downstream from Rainbow Bridge. It is capable of storing water to a maximum surface elevation of 3700 feet above sea level. When the impounded reservoir waters reach an elevation of 3606 feet, the reservoir is filled to approximately one half of its capacity and the waters are backed far enough into Bridge Canyon to reach the Monument boundary. (Appendix B at LVI) The Commissioner and the Secretary intend to operate the reservoir up to the maximum storage elevation of 3700 feet even though doing so will innundate Monument lands. If the reservoir is operated at 3700 feet, the water will be 48 feet deep in Bridge Creek directly beneath Rainbow Bridge, some 25 feet below the base of the Bridge structure itself. (Appendix B at LVI)

Construction of the Glen Canyon Dam and Reservoir were authorized by the Colorado River Storage Act of 1956. (43 U.S.C. §§ 620 et seq.) This Act was passed to implement the Colorado River Basin Compact of 1922 which apportions Colorado River water between the states of the Upper and Lower Colorado River Basins. The reservoir's principal function was to provide sufficient storage capacity in the Upper Basin to assure that the Upper Basin states could develop consumptive uses for their compact allocation and still be able to deliver downstream water allocated to the Lower Basin states under the Compact and to Mexico by Treaty. (Appendix B at

LVIII) Until the Upper Basin states had sufficient reservoir capacity to hedge against dry years, they could not safely develop uses for their full Compact allocations.

A national coalition of conservation groups opposed enactment of the Colorado River Storage Act as originally proposed because it authorized the proposed Echo Park Dam which would have flooded Dinosaur National Monument and set a precedent for future encroachments by reclamation projects into the national park and monument system. (Appendix A at XXVIII) The opposition to encroachment was effective, and to clear the way for passage the House of Representatives amended Sections 1 and 3 by adding the language set forth under Statutes Involved. No hearings were held on these amendments and their only legislative history is contained in the record of the floor debates, in a brief supplemental report on the bill by the House Committee on Interior and Insular Affairs, and in the Conference Report which states:

> The matter of retaining intact our national park system was an important issue in the consideration by Congress of this legislation. The House approved bill — (1) deleting the Echo Park Storage unit, (2) requiring "protective measures to preclude impairment of the Rainbow Bridge National Monument", and (3) expressing the "intention of Congress that no dam or reservior constructed under the authorization of this Act shall be within any national park or monument," . . . makes clear the intention of the House that there be no invasion or impairment of the national park system by the works authorized to be constructed under this legislation. The conference

committee upheld the House position and adopted the House-approved language. (102 Cong. Rec. 5768 (1956)).

Upon the addition of these amendments to the bill, opposition to passage was withdrawn. (Appendix A at XXVIII to XXXI; Appendix B at LIX)

In 1960, as construction was proceeding on the Glen Canyon Dam and the time was approaching to close the diversion tunnels and start impounding water, the then Commissioner of the Bureau of Reclamation requested appropriations to implement Section 1 of the 1956 Act by constructing protective works to keep reservoir waters out of Rainbow Bridge National Monument. The appropriations subcommittees opposed the protective works on the ground that they would prove more difficult and expensive to build than the Bureau had represented during the hearings on the 1956 Act; that they would mar the landscape in ways not originally suggested; and that the available studies indicated that water under Rainbow Bridge would not cause structural damage. (Appendix B at LXII-LXIV) The Commissioner stated that if Congress did not appropriate money to construct the protective works called for by Section 1, Section 3 "could very probably limit the operation of the Glen Canyon [unit] to a reservoir pool below the level that would infringe upon the monument area".[2]/ At the recommendation of the subcommittees Congress did not appropriate the requested funds in the 1961 appropriations act and inserted therein the proviso set forth above under Statutes Involved. An

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2/ Hearings on Public Works Appropriations for 1961 before a Subcommittee of the House Committee on Appropriations, 86th Cong., 2nd Sess., pt. 2 at 518 (1960).

identical proviso was included in the 1962 appropriations act.

In the hearings on the 1963 appropriations bills Interior Secretary Udall appeared personally to request an appropriation to implement Section 1. When members of the appropriations subcommittees indicated that they were not disposed to recommend the appropriation to Congress, Secretary Udall stated:

> . . . there remains the broader policy question covered in Section 3 of the Act which has reference to long-established policy of minimizing encroachment by man-made structures in national parks or monuments. The original commitment was made by Congress, and the Congress must . . . either keep the commitment made or abrogate it.[3]/

Some members of the subcommittee stated that the issue of protecting Rainbow Bridge National Monument had been already settled by the congressional refusal to allow appropriated funds to be expended to construct the protective works. After 1963, neither the Secretary nor the Commissioner made any further requests for funds to implement Section 1. Provisos identical to those in the 1961 and 1962 acts were included in each subsequent appropriations act up to and including the currently effective act. (Appendix B at LXIV-LXV)

Beginning with 1960, a total of eight different bills have been introduced in Congress expressly to repeal or

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[3]/ Hearings on Public Works Appropriations for 1963 before a Subcommittee of the House Committee on Appropriations, 87th Cong., 2nd Sess., pt. 3 at 4-5 (1962).

alter Section 3 of the 1956 Storage Act. Senator Bennett of Utah, in introducing one of these bills in 1961, expressed his opinion that Congress should pass his bill to "affirmatively meet the question of backing water into the Rainbow Bridge National Monument." (107 Cong. Rec. 13920 (1961)). None of the six bills introduced in previous Congresses was enacted. Two of the bills are now pending before the present Congress, one before the House of Representatives and one before the Senate.[4/]

In 1968 Congress passed the Colorado River Storage Project Act authorizing a number of projects including the Central Arizona Project and approving and enacting a compromise agreement that had been negotiated between the states of the Upper Basin and the states of the Lower Basin concerning storage and releases of water. (43 U.S.C. §§ 1501 et seq.) Two provisions in the statute referred to the possibility of operating the Glen Canyon Reservoir up to its Maximum designed capacity of 3700 feet above sea level, a level which would cause water to back into the Monument. (Appendix C at LXXXII to LXXXIII and LXXXVI to LXXXVII) The Act also provided that its provisions would not alter the Colorado River Compacts or the Mexican Treaty and that it would not alter or amend previous statutory enactments, including the 1956 Storage Act, "except as otherwise provided herein." (43 U.S.C. § 1551) The 1968 Act did not contain provisions dealing with national parks and monuments and made no express changes in either Section 1 or Section 3 of the 1956 Act.

4/ S. 3180 (1960), S. 175 (1961), S. 1188 (1961), S. 333 (1963), S. 1555 (1967), S. 307 (1969), S. 1057 (now pending before the Senate), H.R. 6255 (now pending before the House).

In November of 1970 the petitioners initiated the present action in the nature of mandamus pursuant to 28 U.S.C. § 1361 in the District Court for the District of Columbia seeking a declaration that the respondents, the Secretary and the Commissioner, are required by Section 3 of the 1956 Act to keep the waters of Glen Canyon Reservoir out of Rainbow Bridge National Monument. Upon respondents' motion, the action was transferred to the District Court for the District of Utah. Subsequently, the Court of Appeals for the District of Columbia denied an application for mandamus challenging the transfer.

Petitions to intervene by the respondents-intervenors were granted by Chief Judge Ritter of the District Court for the District of Utah. Cross motions for summary judgment were then filed, and on February 27, 1973, the District Court entered judgment for petitioners holding that "Congress' express statement of its intentions in Section 3 of the Storage Act is dominant over and controls mere inconsistencies in later enactments" and that an implied repeal of Section 3 could be found only if "Congress had affirmatively required the operation of the Dam in such a way that Rainbow Bridge National Monument must be flooded." (Appendix A at XLII) The District Court permanently enjoined the Secretary and the Commissioner from allowing the waters to enter or remain within the National Monument.

Respondents appealed the District Court's judgment to the Court of Appeals for the Tenth Circuit and applied to the District Court for a stay of judgment pending appeal. The application for stay was denied by the District Court on April 21, 1973, but an application for a stay to

the Court of Appeals was granted by a two to one vote on May 1, 1973. On May 4, 1973, petitioners applied to the Supreme Court for vacation of the stay order of the Court of Appeals. The application was referred by Mr. Justice White to the entire Court and thereafter denied on May 14, 1973.

The Court of Appeals heard the appeal *en banc*, and on August 2, 1973, by five to two majority, reversed the judgment of the District Court. The majority opinion by Judge Seth concluded that Congressional denial of appropriations and prohibition of use of money for protective works indicated that Congress had reversed its "previous position after considering it fully in the public hearings and after the members apparently came to the conclusion that the protective works would be more detrimental than the presence of water in the Monument." (Appendix B at LXVI to LXVII) The opinion further stated that this was "not really a situation of repeal by implication." (Appendix B at LXVII) Despite its conclusion that Section 3 was no longer enforceable, the majority remanded the case to the District Court for ten years' continuing jurisdiction in the event water levels should significantly exceed the Bureau of Reclamation projections or some other unexpected indication of structural damage to the Arch should become evident. (Appendix B at LXXII) Judges Holloway and Barrett joined Judge Seth's majority opinion, and Judge Doyle and McWilliams wrote concurring opinions, Judge McWilliams specifically dissenting from the majority's remand for ten years' continuing jurisdiction "to permit the plaintiffs to seek further relief if future events would justify such."

(Appendix B at LXXIII to LXXIV) Chief Judge Lewis dissented in an opinion joined by Judge Hill which asserted that the majority's decision violated the doctrine of separation of powers and that it had "to all practical effect, enacted legislation which is actually pending before Congress for its consideration." (Appendix B at LXXX)

REASONS FOR GRANTING THE WRIT

The Court of Appeals judgment contradicts numerous United States Supreme Court decisions as well as decisions of Courts of Appeal in other circuits defining the power of courts to declare statutes repealed by implication. In addition, the judgment interfers with an ongoing legislative process and violates the doctrine of separation of powers by disposing of policy questions of national concern, including questions involving National Parks and Monuments, that are within the province of Congress and that are presently before Congress for disposition. The judgment of the District Court, on the other hand, properly reconciles existing federal laws and leaves policy questions to Congress.

A. The United States Supreme Court established stringent prerequisites for finding an implied repeal in *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936):

> The cardinal rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible. There are two well-settled categories of repeals by implication–(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes

> an implied repeal of the earlier one; and (2) if the later one covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest. . .

The Supreme Court on only two occasions has held that authorizations for payment subsequently were repealed by implication and in those cases it was unmistakable that Congress had changed its mind and fully intended to deny funds to pay amounts previously authorized. *United States v. Dickerson*, 310 U.S. 554 (1940); *Mathews v. United States*, 123 U.S. 182 (1887). However, the Court has never held that an express congressional prohibition has been repealed by implication from subsequent appropriation acts, although the instances in which repeals by implication have been rejected are legion. See, e.g., *Posadas v. National City Bank, supra; United States v. Vulte*, 233 U.S. 509 (1914); *United States v. Langston*, 118 U.S. 389 (1886). See also, *Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 783 (D.C. Cir. 1971).

Section 1 of the 1956 Act is an authorization for protective works, and petitioners concede that, in view of the appropriations acts provisos quoted above, at the present time courts cannot order the Secretary to comply with that section. Similar annual suspensions have been used before by Congress. The Supreme Court considered a suspension of previously authorized military reenlistment allowances in *United States v. Dickerson, supra*, and held

merely that there had been a yearly suspension of the previously authorized reenlistment allowances.

Section 3 of the 1956 Act is a different matter, however, and is outside the holding of the *Dickerson* case. Congress has at no time repealed the broad prohibition in Section 3 barring dams and reservoirs from national parks and monuments; whenever it has been faced with the question of altering this policy, Congress has declined to modify or compromise it in any way. Nothing Congress has done in refusing to appropriate funds or enacting reclamation bills can sustain a repeal by implication. The reconciliation of the 1956 Act and the later appropriations acts was provided by the testimony of former Reclamation Commissioner Dominy in his statement quoted above -- the Secretary can comply with Section 3 by operating the reservoir at levels below the boundary of Rainbow Bridge National Monument. Since the statutes can be reconciled, the *Posadas* standard for finding an implied repeal has not been met.

In addition to the provisos in the appropriations acts, the Court of Appeals majority relied upon the passage of the 1968 Colorado River Basin Project Act. For the Court of Appeals the most telling aspect of that Act was its inclusion of provisions seemingly premised on the assumption that the reservoir would at times be operated to its designed capacity of 3700 feet above sea level. Although the 1968 Act did not mention Rainbow Bridge National Monument or the critical language of either Section 1 or Section 3 of the 1956 Act, it appeared that all of the benefits of the reclamation enterprise contemplated

by the Act could be achieved only by allowing the reservoir water to rise into the Monument. Accordingly, the Court of Appeals concluded that Congress must have intended to render inoperative the 1956 statutory barriers prohibiting water in the Monument.

The *Posadas* rule forbids such a conclusion unless the two acts are irreconcilable, *and* there is a clearly manifest Congressional intent to repeal the earlier act. The words of the 1968 Act deny the intention to repeal. Section 601 states that "Nothing in this Act shall be construed to alter, amend, repeal, modify, or be in conflict with [the two interstate compacts, the Mexican Treaty, or a Supreme Court decision], or, except as otherwise provided herein, [specified Colorado River reclamation statutes including the 1956 Act]." (43 U.S.C. § 1551) In harmony with this announced intent, Sections 501 and 502 of the 1968 Act expressly amended certain portions of the 1956 Act — not including Sections 1 or 3 — by word-for-word changes. (82 Stat. 896-99)

Nothing in the 1968 Act requires the Secretary of the Interior to maintain Glen Canyon Reservoir at 3700 feet or at any other particular height. Section 602 (43 U.S.C. § 1552) lists circumstances that entitle the Lower Basin to require water releases and circumstances that entitle the Upper Basin to store water. Read in isolation from all other laws affecting the Colorado River, this section might be interpreted to confer upon the Upper Basin States an absolute and unqualified right to store water whenever Section 602 does not require releases to be made upon demand of the Lower Basin States. But clearly there are circumstances other than those described

in Section 602 when water releases are required. Releases to generate power pursuant to Bureau of Reclamation power sales contracts and releases to control floods and to support ecosystems and recreation values in the Grand Canyon are obvious examples.

Section 301 of the 1968 Act (43 U.S.C. § 1521) dealing with the operation of the Granite Reef Aqueduct (part of the Central Arizona Project), provides that the flows allowed through the aqueduct many be increased above a stated maximum only when the water level of the reservoir reaches 3700 feet. But again, there is nothing in the Act that requires that the water level reach 3700 feet, and there are many possible reasons why it might not reach that height.

It is not unusual for Congress to provide for results that cannot actually be realized until some further approvals are given or other interim events occur. Frequently, federal projects die aborning because Congress fails to appropriate funds to honor previous authorizations for appropriations. When Congress authorizes public works projects, other laws such as the National Environmental Policy Act (42 U.S.C. §§ 4321-47) are not thereby automatically suspended unless Congress clearly so provides. *Committee for Nuclear Responsibility v. Seaborg, supra.* There frequently remains the possibility that projects will not become realities if other legal conditions are not satisfied. Congressional provision for operating Glen Canyon Reservoir above 3606 feet is not a meaningless legislative exercise merely because the limitations of the 1956 Act may now prevent the water from entering Rainbow Bridge National Monument. Congress can make Sec-

tions 602 and 301 fully operative at any future time either by appropriating funds to build protective works pursuant to Section 1 or by repealing Section 3. As previously indicated, bills are currently pending before both the House of Representatives and the Senate to repeal Section 3.

The legislative history of the 1968 Project Act confirms that Congress had neither forgotten its commitment to the National Park system nor relaxed its resolve to keep reclamation works out of national parks. During the course of the congressional deliberations, several attempts were made to include authorizations for projects within the boundaries of Grand Canyon National Park. These attempts evoked such vehement opposition that it became clear that the Project Act could not be passed if it countenanced any invasion of the Grand Canyon. Illustrative of the mood of opponents was the statement of Congressman Saylor, now the senior minority member of the House Committee on Interior and Insular Affairs:

> While we haven't invaded any national park, so far, I don't propose to see that this national park is invaded by the waters of any dam whether you call it the Hualapai, Havasupai, Bridge Canyon or any other name that anybody wants to give it.[5]/

To attribute to Congress an intention to compromise a policy of such importance in an Act making no mention whatever of the national park system is to assume that

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5/ Hearings on H. R. 3300 and similar bills before the House Committee on Interior and Insular Affairs, 90th Cong., 1st Sess., Ser. 90-5, pt. 1 at 338.

Congress intended to accomplish obliquely as to Rainbow Bridge a result it found totally unacceptable for Grand Canyon. No such intention on the part of Congress should be presumed in the absence of overwhelming evidence.

Congress has repeatedly been urged to repeal Section 3;[6/] it has consistently declined to do so. The Supreme Court has held that when Congress refuses to repeal a statute the courts may not imply repeal from other congressional actions. *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945)

B. In finding Section 3 of the Storage Act to have been rendered ineffective through a congressional change of position, the Court of Appeals has trespassed upon the constitutional doctrine of separation of powers. Section 3 is a particularly unambiguous manifestation of long-standing congressional policy to protect the national park and monument system for future generations. By including Section 3, Congress conditioned and limited the entire 1956 Act. The Court of Appeals majority simply ignores these policies and devotes its analysis to the reclamation purposes of the statutes involved here: Section 3 must be treated as repealed, the court finds, because if enforced it would seriously impair the reclamation enterprise that Congress has, after all, authorized and funded. While to many persons the result achieved by the Court of Appeals may seem a commendable solution to a particularly vexing problem, if that result stands, it will have been achieved at a high cost to constitutional principle. The dissenting opinion of Chief Judge Lewis of the Court of Appeals states it well:

[6/] See note 4, *supra*.

> In simple summation the court has done that which the Congress has many times refused to do and has, to all practical effect, enacted legislation which is actually pending before Congress for its consideration . . . This is not a judicial prerogative. Current events in other unrelated fields indicate that more problems are created than solved by a softening of the basic concept of a firm and strict application of the doctrine of separation of powers. (Appendix B at LXXX)

C. The importance of this case extends beyond Rainbow Bridge National Monument, and its outcome will have significant effects throughout the national park system. Unless the courts check the license the Secretary and the Commissioner have taken with Congressional policy, other parks and monuments may also be compromised by utilitarian encroachments of the kind that Congress historically has prohibited. Consistently, Congress has controlled man's activities in parks and monuments and has barred from these special places such uses as mining, logging and reclamation works.[7/] This jealous, protective attitude was expressed with extraordinary clarity when the 1956 Colorado River Storage Bill was amended to insert Section 3 announcing "the intention of Con-

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7/ See, e.g., Mineral Leasing Act of 1920, 30 U.S.C. § 181 (specifically precludes leasing); Federal Water Power Act, 16 U.S.C. § 796 (bars licensing of water and power facilities); National Park Act of 1916, 16 U.S.C. § 3 (authorizes timber cutting only to control insects, diseases, or to conserve park values); 16 U.S.C. § 5 (allows power transmission rights of way only after specific approval and a finding of compatibility with the public interest). The Alaskan Pipeline Bill recently passed by the Senate (S. 1981, 93d Cong., 1st Sess.) specifically precludes authorizations for pipelines, reservoirs, and other facilities within the national park system. At this writing the Senate and House Bills are in conference; the House Bill (H.R. 9130) contains no provision clashing with these protective provisions.

gress" that the authorized dams and reservoirs not be allowed within *any* national park or monument. Relying on a highly questionable reading of subsequent congressional actions, the Secretary and the Commissioner have determined that Section 3 no longer prohibits flooding Rainbow Bridge National Monument. If such administrative looseness with congressional policies is allowable, one can readily imagine other instances when particular utilitarian goals might seem sufficiently important to justify modest encroachments into other parks and monuments. The universal value of the national park system merits the attention of the Supreme Court in defining the limits of the power of administrators in dealing with these important congressional policies.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

OWEN OLPIN
College of Law
University of Utah
Salt Lake City, Utah 84112

JAMES B. LEE
CONSTANCE K. LUNDBERG
of and for
PARSONS, BEHLE & LATIMER
79 South State Street
Salt Lake City, Utah 74111

CHRIS P. WANSGARD
of and for
VANCOTT, BAGLEY,
CORNWALL & McCARTHY
141 East First South
Salt Lake City, Utah 84111

Attorneys for Petitioners

APPENDIX A

FRIENDS OF THE EARTH et al.,
Plaintiffs,

vs.

ELLIS L. ARMSTRONG, Commissioner, Bureau of Reclamation, and Rogers C. B. Morton, Secretary of the Interior,
Defendants.

Civ. No. 116-71

United States District Court, D. Utah, C. D.

April 21, 1973.

RITTER, Chief Judge

OPINION

Three plaintiffs join in this suit: Friends of the Earth, Wasatch Mountain Club, Inc., and Kenneth G. Sleight.

Friends of the Earth is a national membership conservation group which states in its pleadings that a number of its members periodically visit and enjoy the use of the Rainbow Bridge and the Monument site, and that they use them in a way that will be significantly injuriously affected by the actions of the defendants. The organization Friends of the Earth represents those injured members in this proceeding.

Wasatch Mountain Club, Inc., a local membership corporation of some 700 members, headquartered in Salt Lake County, Utah, whose purposes include recreation, preservation of the environment, and educational programs regarding the out-of-doors, alleges that, "Several of Wasatch Mountain Club's members periodically visit and enjoy the use of Rainbow Bridge National Monument and Wasatch Mountain Club organizes frequent trips to Rainbow Bridge and the surrounding area each summer." Wasatch Moun-

tain Club further states that its members use the Rainbow Bridge and the Monument site in a way that will be significantly injuriously affected by the actions of the defendants. The organization Wasatch Mountain Club, Inc., represents its injured members in this proceeding.

Kenneth G. Sleight, the third plaintiff, is a resident of southeastern Utah, and lives in the general area of Glen Canyon and the Rainbow Bridge Monument. He is licensed and employed as a wilderness guide in the area of Rainbow Bridge National Monument. He conducts tours along the Green and Colorado Rivers in Utah and Arizona. Plaintiff Sleight has a special use permit to conduct guided tours in the Glen Canyon National Recreational Area, and in his capacity as tour guide he has conducted several tours to Rainbow Bridge.

Plaintiffs, in this action in the nature of mandamus under 28 U. S. C. § 1361,[1] seek to prevent the Commissioner of the Bureau of Reclamation and the Secretary of the Interior from unlawfully allowing the waters of the reservoir impounded behind Glen Canyon Dam on the Colorado River to flow into Rainbow Bridge National Monument, and to require them to perform their statutory duties and take adequate protective measures to preclude impairment of the Rainbow Bridge National Monument.

Sections 1 and 3 of the Colorado River Storage Act[2] (which authorized construction of Glen Canyon Dam) provide as follows:

> *Section 1—*
> ". . . That as part of the Glen Canyon Unit, the Secretary of the Interior shall take adequate protective measures to preclude impairment of the Rainbow Bridge National Monument."

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[1] 28 U. S. C. § 1361 provides:
The District Courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

[2] 43 U. S. C. § 620 et seq.

Section 3—
"It is the intention of Congress that no dam or reservoir constructed under the authorization of this Act shall be within any national park or monument."

The emphasis Congress placed upon its intention to protect Rainbow Bridge National Monument is clear: Section 3, "* * * no dam or reservoir * * * shall be within *any* national park or monument." Section 1, "* * * the Secretary of the Interior shall take adequate protective measures to preclude impairment of Rainbow Bridge National Monument"—protection in general for Rainbow along with "* * * any national park or monument"—protection in particular for Rainbow in addition by an express statutory duty upon the Secretary of the Interior, in the Colorado River Storage Act "* * * as part of the Glen Canyon Unit * * *."

Congress intended Section 3 to be an absolute mandate whether protective works are ever constructed or not. Congress has not appropriated funds for the purpose of constructing the protective works contemplated in Section 1. See *infra.*

Both plaintiffs and defendants have moved for summary judgments.

Rainbow Bridge is a majestic sandstone arch in the eroded Colorado River Canyon lands of Utah. It is the world's largest natural arch.

To protect the great arch, the surrounding 160 acres were set aside as Rainbow Bridge National Monument by Presidential proclamation on May 30, 1910, a copy of which is attached to the complaint. The Monument, along with all our other national parks and monuments is under the charge of the National Park Service. Defendant Secretary of the Interior Morton is in charge of both the National Park Service and the Bureau of Reclamation, which, under him, manages the Glen Canyon Unit of the Colorado River Storage Project, which is a serious conflict of interest. Rain-

bow Bridge National Monument and other National Monuments are created by Executive Order pursuant to the Antiquities Act of 1906, § 2, 16 U. S. C. § 431, 34 Stat. 225 (1906) from lands of the public domain. They have the same status in law as the National Parks, which only differ from National Monuments in that they are created by special Congressional enactments and tend to be of greater area. The arch proved to be far and away the most spectacular in all nature and President Taft designated it a national treasure in the proclamation, the preamble of which recites:

> "WHEREAS, an extraordinary natural bridge having an arch which is in form and appearance much like a rainbow, and which is three hundred and nine feet high and two hundred and seventy-eight feet span, is of great scientific interest as an example of eccentric stream erosion, and it appears that the public interest would be promoted by reserving this bridge as a National Monument, together with as much land as may be needed for its protection;".

Studies of the Navajo country were made during the field seasons 1909-1911 and 1913 by Herbert E. Gregory, geologist in the United States Geological Survey, and Yale University Professor of Geology, from 1900 to 1952.

Two principal publications came from Gregory's Navajo work during those field seasons: a large United States Geological Survey Water Supply Paper 380, (1916), and a United States Geological Survey Professional Paper 93, (1917). Both are publications of the Department of Interior, Franklin K. Lane, Secretary, United States Geological Survey, Government Printing Office, Washington, D. C.

Gregory's Water Supply Paper 380 (1916), the first of his several[3] important scientific contributions about the

[3] A bibliography of Herbert E. Gregory's publications on the geology of the Navajo Canyon country would include 28 papers published between 1910 and 1951.

canyon country, is the first detailed description of the entire Navajo country. Prior to 1909, and at the start of Gregory's experience in the plateaus, geologic work had been restricted to the borders of the area Gregory studied. And Gregory could say: "In 1910 our party (U. S. Geological Survey) had the pleasure of making the first geological study of Navajo Mountain, a project not heartily approved by the Indians. To the Navajo the Mountain has sacred associations." (Water Supply Paper 380, page 47.)

The steps in the formation of the Rainbow Bridge are traced through the trained eyes of the eminent geologist in his Professional Paper 93, (1917), page 135:

"Perhaps the most striking erosion feature within the Navajo country is the recently discovered Rainbow Bridge, which spans Bridge Canyon, on the northwest slope of Navajo Mountain. (See Pl. XXXI, B.) Its symmetry and graceful proportions, as well as its size and beauty of color, give to this arch a commanding position among the natural bridges of the world. For the Navajos the bridge is Nonnezoshe, the great stone arch; to the Piutes its form and bright-red tones suggest Barohoini, the rainbow, the mythical path of the sun. In the landscape of Rainbow Plateau the bridge is not a conspicuous feature, being lost in a labyrinth of profound canyons and lofty towers. From the rim of Bridge Canyon it appears as a hoop bent across an inner gorge. (See Pl. XXXI, A.) In near view its grandeur is realized and its structural plan revealed. The arch rests on a bench of bedded sandstone below which the inner gorge of Bridge Creek is sunk to a depth of 80 feet. Between the chord uniting the springers at the level of this supporting bench and the lower side of the keystone point the vertical distance is 187 feet, and the arch at its summit is 42 feet thick. The total height of the crown above water is therefore 309 feet—exceeding that of the second greatest bridge in the United States, Sipapu (the gate of heaven), in White Canyon, Utah, by 89 feet. The span of the bridge is 278 feet.

"The bridge can not be traversed; its curvature is too

great and its smoothed rock sides offer no footholds. Access to the summit is obtained by the use of ropes let down from the cliffs above.

"The Rainbow Bridge (see Pl. XXXII, B.) is carved from a single massive cross-bedded stratum of Navajo sandstone; the ends of the arch rest on bedded rock of middle La Plata age. One limb of the arch rises free from a broad platform and is encircled by an abandoned meander curve; the other limb is firmly buttressed against the canyon wall. In the light of these facts, the steps in the formation of the bridge may be traced. In its first expression the block from which the arch is carved extended from the canyon wall as a narrow meander cusp. The attack of the erosive forces was twofold: disks and shells outlined by curved laminae of the porous Navajo sandstone were removed from both faces of the spur and at the same time ground water was making its way through joint cracks and along the surface of the underlying relatively impervious beds. The spur was thus continuously narrowed and undermined. Whether the scaling reached a stage when the spur wall was perforated is not known; but it is believed probable that the wall was pierced by a window that stood above the newly developed subterranean channel. As time went on Bridge Creek adopted the shorter, steeper course beneath the spur, abandoning the ancient meanders. Undermining and scaling could then proceed at an increasing rate; the bridge was narrowed and increased in height and in length of span until the present magnificent arch was formed. The bridge thus owes its position to stream adjustment; its form is due to erosion of homogeneous sandstone guided by tangential cross-bedding."

Gregory says, (Water Supply Paper 380, P. 45, footnote 1): "The existence of this bridge was reported to me in July, 1909, by John Wetherill, who received his information from a Piute herdsman. A visit to this locality during this year was prevented by other obligations. In August, 1909, Mr. W. B. Douglass, of the General Land Office, in company with Prof. Byron Cummings of the University of Utah, were conducted to the bridge by Wetherill and Col-

ville, of Oljeto. So far as known the Rainbow had not been viewed by white men before that date. This bridge has been described by my assistant, Joseph E. Pogue (The Great Rainbow Natural Bridge: Nat. Geog. Mag., Vol. 22, pp. 1048-1056, 1911)."

Joseph E. Pogue was scientific aid in the United States Geological Survey party assisting Herbert E. Gregory in his studies of the Navajo country, 1909-11 and 1913. (Water Supply Paper 380, 1916, and U. S. G. S. Professional Paper 93, 1917). Pogue visited the Rainbow Bridge with Gregory in July, 1910, during the field investigations that season. Gregory and his survey party visited the Rainbow Bridge less than a year (July, 1910) after the Cummings-Douglass party (August, 1909). Pogue's excellent description of Rainbow Bridge is based upon the field work of the Gregory survey party, and adopted by Gregory.

"THE GREAT RAINBOW NATURAL BRIDGE OF SOUTHERN UTAH

By Joseph E. Pogue, United States National Museum.

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"Near the southeast corner of Utah, in a remote and wellnigh inaccessible part of the Navajo reservation now given over to the use of the Piutes, is situated a natural bridge, called by the Navahoes *Nonnezoshe*, the stone arch, by the Piutes *Barohoini*, the rainbow, which surpasses any structure of its kind known to man. Even the other great bridges of southern Utah, the Caroline, the Augusta, and the Edwin, known since 1902, are exceeded in size and beauty by the rainbow arch. Discovered but little over a year ago, it has thus far been visited by less than 25 white men and described but once. (Byron Cummings. The Great Natural Bridges of Utah. National Geographic Magazine v. 21 (1910), pages 157-167.)

"Recently a United States Geological Survey party,

consisting of H. E. Gregory, in charge; John Wetherill, K. C. Heald, and the writer, stood upon the summit of Navaho Mountain and looked over a country of wildness and grandeur. Fifty miles to the north the graceful peaks of the Henry Mountains outlined themselves against the horizon; much nearer, the Colorado and San Juan rivers united in the midst of a tilted and disjointed table-land; to the west, the Colorado was already beginning to make that wonderful mile-deep gash so fitly called the Grand Canyon; while to the south was visible the even skyline formed by the extensive tops of Black and White mesas. Turn in whatever direction one would, the scene was one of bewildering magnitude.

"Nearer at hand, surrounding the mountain like an island, surged a billowy sea of red sandstone, carved into fantastic, rounded, and oval masses, colossal in size, between whose crossbedded and swirling slopes wound deep and tortuous canyons. Hidden away in such a labyrinth, it is not surprising that the bridge remained so long unknown. Yet it is only four miles distant in a northerly direction from the mountain's summit, and is visible from this point as a tiny arch, provided one knows exactly where to look. Otherwise the eye may wander at will over this wilderness of rock without sighting its most interesting feature.

"Although so close at hand, this goal was only reached after two days' time and a journey of 35 miles over a very indirect route. The mountain had to be descended to the south, a long detour made around its eastern flank, and a devious and winding course followed northward down the bridge canyon, over a trail ever difficult and ofttimes dangerous. The way led between lofty and perpendicular cliffs, towering to a sheer height of one-fifth of a mile, on whose vertical sides could now and then be described the crumbling ruins of some ancient cliff-dwelling.

"In places the walls overhung to form vast semi-spherical chambers, large enough to shelter a cathedral, and in which a shout echoed and re-echoed many times, in other places the sides approached so closely that the only foot-

hold was in the rocky bed of the small stream below, where one was forced to pick a precarious passage from boulder to boulder.

"After hours of laborious and intricate travel, a point was rounded and 1500 yards ahead a graceful arch was outlined, beneath which the canyon and stream continued their flexuous partnership. The first view of the bridge is minimized by the lofty walls beyond and the comparatively narrow defile, through which it is only partly visible; but once passed under, it may be seen in its magnificence and entirety.

"A towering arch, rainbow-shaped, of wonderful symmetry, rises nearly sheer from a ledge on the one side, and, spanning the stream, joins the opposite canyon wall on its downward curve. The opening, augmented by a gorge cut by the stream to a depth of 80 feet below the level of the supporting bench, measures a vertical distance of 267 feet; but the total height from stream-bottom to the top of the arch is 309 feet, while the abutments at their base stand 278 feet apart. The causeway, upon which one may be lowered from an adjacent cliff, but whose sides are too steep to serve for a complete passage, is 33 feet wide by 42 feet thick at its keystone point; and the limbs are not greatly in excess of these dimensions.

"A mere recitation of figures must fail to convey an adequate idea of the imposing nature of the bridge. It is not the size alone, though this far exceeds the greates masonry arches constructed by engineering skill; nor is it solely the graceful lines or curvature of maximum stability, but rather all of these, that combine to make this the most remarkable single arch known. It would easily span, with room to spare, the dome of the Capitol at Wasington; or, if hung over the Flatiron Building of New York, its limbs would come within a few feet of the ground, though to the west of Fifth Avenue on the one hand and to the east of Broadway on the other.

"The arch is carved from a buff-colored, fine-grained sandstone, brick-red upon its surface and stained with ver-

tical streaks of a darker shade. Mostly massive, though in part oblique-bedded, the rock is only moderately firm, and is easily crushed beneth the blows of a hammer. Geologically it is a part of the Upper La Plata sandstone, a formation of great thickness, deposited in Jurassic time over a large portion of southeast Utah, southwest Colorado, and northeast Arizona.

"The origin of the arch is simple and evident. It was caused by the progressive narrowing of the neck of a meander intrenched between high and steep walls, until an opening was made through the tongue of intervening rock, permitting the stream to cut off its meander by flowing beneath the arch thus formed. The hole, once made, has been enlarged and given its present shape by the combined action of weathering, expansion, and contraction due to changes in temperature, and the carving effect of windblown sand, all of which unite to produce the rounded rock-forms so characteristic of this region. The abandoned arm of the meander is present and unmistakable, indicating the former course pursued by the stream.

"Though doubtless requiring many years for its formation, the arch is nevertheless a very recent geological feature, and destined to withstand the forces that gave it being for only a brief period as geologic time is reckoned.

The bridge was first visited by white men and its existence made definitely known on August 14, 1909. It was then reached by a party consisting of W. B. Douglass, of the United States General Land Office, with four assistants; Bryon Cummings, of the University of Utah, with three students; John Wetherill, of Oljato, Utah; and two Piute Indians, Jim and Nasjabegay. Douglass was acting under instructions from the Department of the Interior, dated October 20, 1908, to investigate a reported natural bridge in southeast Utah, with a view to making it a national monument if found of sufficient interest. An attempt was made in December, 1908, to locate the bridge, but was abandoned on account of snow. The search was renewed in August, 1909, the party being joined at Oljato by Cummings, Weth-

erill, and the three students. The arch was surveyed by Douglass, and the figures herein used, as well as the details of its discovery, are taken from his official report to the Land Office.

"The bridge was undoubtedly known to the Indians prior to its discovery by white men: but as to the actual knowledge of it there is uncertainty. Douglass relates that Whitehorsebegay, his guide, on a second visit to the bridge, would not go beneath the arch, but laboriously clambered around one side whenever it was necessary to pass. Later Mrs. John Wetherill, an accomplished Navaho linguist, ascertained from an old Navaho that the arch is supposed to represent the rainbow, or sun-path, and one who passed under could not return without a certain prayer. Evidently Whitehorsebegay had forgotten this prayer and feared vengeance should he break the legendary prohibition. Nearly beneath the arch are the remains of an ancient altar, built doubtless by the cliffdwellers, indicating that the bridge was probably an object of superstitious worship even to this ancient people.

"The bridge is at once the largest and most remarkable known. Not only in size but in shapeliness does it surpass any of its rivals. Below is tabulated for comparison the dimensions in feet of the largest of the natural bridges, the measurements of the first four taken from the surveys of W. B. Douglass.

	HEIGHT.	SPAN.	WIDTH.	THICKNESS.
The Barohoini (rainbow) or Nonnezoshe (stone arch), southeast Utah	309	278	33	42
The Sipapu (gate of heaven) or Augusta, southeast Utah	220	268	31	53
The Kachina (guardian spirit) or Caroline, southeast Utah	210	277	44	50
The Owachomo (rock mound) or Edwin or Little, southeast Utah	106	180	28	9
The Virginia Natural Bridge	200	45		
Pont d'Arc, France	197	213		

"The exact location of the bridge is latitude 37° 03′ 21″ and longitude 110° 56′ 48″ west of Greenwich (Douglass), in San Juan County, Utah; six miles northward from the Arizona-Utah boundary line; four miles west of north from the summit of Navaho Mountain, and four miles above exit of the bridge canyon into the Colorado River at a point 16 miles below its confluence with the San Juan.

"The most exact directions for reaching the bridge would be inadequate, so obscure and devious is the trail leading thereto; hence the services of a guide are indispensable. Oljato, Utah, where guide and outfit for the final portion of the trip may be secured, is reached by two routes, between which there is little choice. On the one hand, Gallup, New Mexico, on the Santa Fe line, may be made the starting point, whence one must go by stage 35 miles to Fort Defiance, Arizona, and from there by wagon or pack outfit 155 miles in a northerly direction to Oljato. On the other hand, the traveler may leave a branch of the Denver & Rio Grande Railroad at Dolores, Colorado, stage 81 miles to Bluff, Utah, and there secure horses for the remaining 60 miles to Oljato. The bridge is distant from Oljato only 37 miles, as the crow flies, but the trail passes over twice this distance, and three days will be required for this last and most difficult part of the trip. A minimum of 18 days should be allowed for the round trip, whether the start be made from Gallup or Dolores and the journey may be accomplished at any time during the year save in winter. The trip is an extremely arduous and toilsome one, and would be fraught with danger to an inexperienced traveler, but under competent guidance may be accomplished with no special hazard, though hardships and inconveniences, and many of them, must be expected.

"The government has already made of this natural wonder a national monument, thus preserving it for all time against vandalism and commercialism and conserving it for the enjoyment of all."

The Forces of Erosion.

The keynote was struck when the President of the

United States proclaimed that Rainbow Bridge is of "great scientific interest as an example of eccentric stream erosion."

The natural forces which formed the Navajo country, Navajo Mountain, and Rainbow Bridge were incredibly powerful. Their potency was truly enormous. Those forces still are present and active and will be exerted upon the scene after Lake Powell waters fill Bridge canyon as the defendants propose to do.

What effects will man's tinkering with nature have upon the bridge?

The "piling of waters into canyons" is not new. Mother nature has been doing that a long, long time. There is evidence about that of unimpeachable authority. It comes from the land itself. Let us "spy out the land", and examine those most credible of all witnesses: the "stubborn and irreducible" facts.

Rainbow Bridge is a part of Navajo Mountain. It lies about halfway down the mountain, as the crow flies, west of north from the summit. The distance from the summit to the bed of the Colorado River before the dam, is about 8 miles. So Rainbow is about 4 miles from the summit of Navajo Mountain and 4 miles from the point where Bridge and Aztec Creeks joined the Colorado River. Before the dam, Navajo Mountain was on the very edge of the Glen Canyon of the Colorado River; now it is on the edge of Glen Canyon reservoir; and the Bridge is about to be in it.

"The extremes of relief are Navajo Mountain 10,416 feet, and the mouth of the Little Colorado River, 2,800 feet above sea level. Along the line of Bridge Canyon an extreme range in elevation of 7,000 feet is attained in a distance of 8 miles." (U. S. G. S. Water Supply Paper, 380, 1916, Gregory, pp. 21-22). These are the greatest downward departures in the entire canyon country—Navajo Mountain, 10,416 feet, and the mouth of Bridge Creek, 3,400 feet above sea level.

"With gradients so steep conditions are favorable for erosion, and all the streams observed are not only carrying

the waste supplied by their tributaries, but are cutting their beds and removing materials * * *". (Gregory, Professional Paper 93, 1917, p. 118).

The erosion on the northern and western sides of Navajo Mountain, (Rainbow side), is particularly heavy. The region possesses a "ruggedness probably surpassed by few other parts of the world. The relief is produced by downward departures from a general surface rather than by hills and mountains rising above plains and valleys. Canyons are so deep and so thickly interlaced that the region appears to be made up of gorges and cliffs intimately associated with mesas and buttes and towers bounded by vertical walls. It is a region of cliffs and canyons. *The streams appear to be impatient;* not content with removing the products of weathering, *they dig deep, closely spaced trenches directly into the rock and remove the intervening material by a process of lateral mining.* Plateau blocks are first outlined by a series of master trenches; secondary trenches cut each block into mesas; ramifying ditches of the third and fourth order cut along planes of fracture, reducing the size of the unit of work and increasing the area exposed to attack. The quarrying streams, substantially aided by disintegration, have long been in operation. In a few places their work is complete, the surrounding land having been reduced to the level of the bottom of the trench; elsewhere various stages of the process may be observed. Probably at no time has the work been more vigorously prosecuted than at present. *Graded streams are lacking in the Navajo country, waterfalls and rapids abound,* and it is difficult to conceive of an intricacy of canyon labrynth and a variety of erosion remnants surpassing those exhibited by the Rainbow Plateau." (Gregory, Professional Paper 93, pp. 117-118, 1917).

Viewed from a distance Navajo Mountain appears as an island in the midst of a sea of waterworn and windworn, brilliantly colored sandstone. "Nearer at hand the profile consists of a steeply rising curve terminated upward by a bench above which lies a forest-covered dome * * *. *Frost work predominates at these altitudes, and areas acres in extent are thickly strewn with large angular blocks ex-*

tending downward as rock streams. Streams in steep-walled canyons reaching up from the Rainbow Plateau are actively eroding the mountain slopes. *On the north and northwest sides headward gnawing is particularly vigorous.* So deep and so close-spaced are the canyons leading to the Colorado and the San Juan that the interstream ridges stand out like buttresses supporting the mountain from the north." (Gregory, Professional Paper 93, 1917, p. 128).

"*Frost is an extremely active agent in the plateau* country. Its quarrying action is noticeable not only at the beginning and end of the cold season but at other times, owing to the wide variation between day and night temperatures. *On Navajo * * * Mountain the slopes above* 8,500 *feet are heavily coated with blocks of rock resulting from the mechanical work of ice.*" (Gregory, Professional Paper 93, p. 118).

"Temperatures below the freezing point are recorded for 7 months of the year in Glen Canyon, 9 months in San Juan Valley, and 10 months on the plateau at Blanding. During most of these months periods of freezing and thawing alternate." (Gregory, Professional Paper 188, 1938, p. 95).

"Gentle rains lasting more than 24 hours are of very rare occurrence in the Navajo country. Only one such was experienced during my four seasons of work. *The characteristic storm is the thundershower of extreme violence,* lasting usually less than an hour * * * Many of the showers result in a heavy downpour, and the total precipitation for a month is not infrequently the result of a single shower." (Gregory, Water Supply Paper 380, 1916, p. 63, Professional Paper 93, 1917, p. 13).

"A study of 52 streams of the Navajo country shows that they fall into two classes, perennial and intermittent. The intermittent streams are perennial through parts of their courses or flow only in response to showers or seasons of rain. These distinctions, which are of *the utmost importance to the inhabitants and to travelers,* are shown on the

map * * *." (Gregory, Professional Paper 93, 1917, p. 12).

"The summer rains *radically change* the aspect of the country. The dry valley floors are covered with rivers and tributary brooks. A single shower may convert any one of a score of intermittent rills into a through-flowing stream and *raise a group of dry washes to the dignity of rivers.* * * * During this period the forbidding dry, hot valleys leading to the Little Colorado are transformed into a series of silt-laden rivers, some of them exceeding 100 miles in length, and the Little Colorado itself becomes a river of *commanding proportions* * * *." (Gregory, Professional Paper 93, 1917, pp. 12-13).

"The keynote of the climate of the Navajo country is variability, marked by sudden changes in temperature and wide fluctuation in rainfall. An intensely hot summer day may be followed by a chilly night; sunlight is synonymous with heat, shade with cold. The high temperature of the forenoon may be lowered by a cold rain or by a hailstorm, only to become reestablished within an hour. *When storms come the country is flooded* * * *." (Gregory, Professional Paper 93, 1917, pp. 13-14).

"The ephemeral streams are nearly always at flood stage, and *their potency in removing the products of disintegration is truly enormous* * * *." (Gregory, Professional Paper 93, 1917, p. 129).

"Their efficiency in stripping the slopes of waste and preventing the formation of talus is augmented by the texture of the rock. Much of the material supplied to the base of the cliff is fine, the product of disintegration of poorly compacted sandstone. In the areas of the Navajo sandstones large blocks pried off from the tops of the cliffs are so lacking in firmness that they crumble to sand on striking the lower slopes * * *. Cliffs in these strata are steep not because the rocks are hard but because they are friable." (Gregory, Professional Paper 93, 1917, pp. 129-130).

"* * * *All the power of the swollen stream* is sud-

denly applied to the task of *pushing rock waste* from the slopes and benches *into the adjoining flooded canyons.*" (Gregory, Professional Paper 93, 1917, p. 130).

"* * * The floods that follow showers in July and August perform *an incredible amount of erosion*: it is unsafe to stand near the bank of a stream while torrents of liquid mud carrying trees and blocks of alluvium are passing." (Gregory, Professional Paper 93, 1917, p. 131).

"* * * Measures of fluctuation in mean annual rainfall have, however, little significance in this region. *Erosion results from sudden violent showers followed by unobstructed runoff* * * *." (Gregory, Professional Paper 93, 1917, p. 131).

"The most significant feature of the rainfall as regards erosion is the violence of showers and the consequent flooding of the surface and *piling of water into canyons.* It is no infrequent experience to observe a rise of 5 to 10 feet in the water of a creek in response to a single shower * * *." (Gregory, Professional Paper 93, 1917, p. 118).

"*Most rains are * * * torrential downpours.* * * * In narrow canyons, dry for a month or more, the water of *a newly made swift-flowing stream may reach a height of* 10 *feet or more within an hour* * * *." (Gregory, Professional Paper 188, 1938, p. 94).

Flash floods are violent in the extreme. They are disasters dreaded by inhabitants and travelers alike. Dry washes become rivers of commanding proportions. The forces they exert are enormous and unpredictable.

All the power of the swollen stream is suddenly applied to the task of pushing boulders, cobbles, gravel, logs and driftwood down the flooded canyon.

That Bridge Creek "undoubtedly is capable of transporting such material downstream during heavy flash floods", is admitted by defendants' own expert, geologist Wallace R. Hansen, in his 1959 "Administrative Report", page 15. "Such capability", he says, "is indicated by the

coarse-textured alluvial deposit at the mouth of Aztec Creek", page 15.

Hansen's reference is to Aztec Rapids, the fast water of the Colorado River caused by the huge boulder delta of Aztec Creek. Historical sites in Glen Canyon, Crampton, No. 46 (Glen Canyon Series Number 12) June 1960, Anthropological Papers, University of Utah, pp. 98-100. Archeological Salvage Project with U. S. National Park Service. Historical Site 29, Aztec Creek.

Hansen further says, (p. 15) such "cobbly and bouldery material * * * is available in higher level terrace remnants at various points along the canyon." The terraces "commonly are 10 to 15 feet thick and they contain abundant quartzitic cobbles and boulders some of which exceed 4 to 5 feet in diameter." Hansen further says driftwood including logs is derived from the timbered heights of Navajo Mountain. (p. 15). Gregory reports that mechanical work of ice—freezing and thawing, has produced acres of large angular blocks of rock extending from the heights of Navajo Mountain as rock streams. (Gregory, Professional Paper 93, 1917, pp. 118 and 128).

So Bridge Creek has the "undoubted" capability of transporting quartzite cobbles and boulders exceeding 4 to 5 feet in diameter, logs and driftwood, all available up the canyon or on upper slopes of Navajo Mountain.

Water backed up by Glen Canyon dam will attain a depth of about 46 feet directly beneath Rainbow Bridge when the water level stands at altitude 3,700 feet above sea level.

Defendants' geologist Hansen adds, however: "Somewhat greater depths, possibly as much as 60 feet, may occur temporarily when periods of extreme flood stake on the Colorado River coincide with highwater behind Glen Canyon dam." (p. 18).

Hansen further says: "According to calculations of the Bureau of Reclamation the water surface of the reserovir

will stand at altitude 3,700 feet only 13 percent of the time during the initial 50 years of operation, but it will be under the bridge 77 percent of the time and within the monument 95 percent of the time unless a barrier dam is constructed downstream to restrain it."

The contact between the Navajo sandstone of the Rainbow Bridge and the Kayenta sandstone on which the ends of the arch rest is at an altitude of about 3,720 feet beneath the Bridge.

At 3,700 feet altitude the depth under the Bridge is 46 feet, only 20 feet below the contact.

Defendants' geologist Hansen makes an amazing statement, (page 19). "The Navajo-Kayenta contact, at an altitude of about 3,720 feet beneath the Bridge, *is sufficiently high to preclude its being wetted even by flood stage water levels in the reservoir.* Even if the water could rise to the contact—which it could not—there is no reason to believe that Rainbow Bridge would be endangered. In fact, intermittent seepage now occurs in the Navajo sandstone just above the contact in the left abutment." Geologist Hansen does not at all consider the effect upon the Bridge of the *combined* high water of the reservoir and flash floods pushing a load of sediment consisting of 4-5 foot boulders, cobbles, gravel, logs and driftwood.

Before Glen Canyon dam, such sediments were flushed through the canyon to the Colorado River.

With Bridge Canyon filled to 3,700 feet elevation, the reservoir waters are a barrier. Has anyone considered what will happen when flash floods come roaring down the steep gradient of Bridge Creek, with a load of 4-5 foot quartzite boulders, cobbles, logs and driftwood, and plow into the backed up waters of the reservoir rights under Rainbow Bridge with explosive force?

Defendants' geologists did not. Nothing has come to the court's attention that anyone has given it any thought.

May it not be found with reasonable scientific certainty

that boulders, cobbles, logs and driftwood will be caught up in a maelstrom and thrown against the moderately firm Navajo sandstone of the arch which can easily be crushed beneath the blows of a hammer? One limb of the arch rises free from a broad platform and is encircled by an abondoned meander curve.

May it not be found with reasonable scientific certainty that on such occasions the stream, by a process of lateral mining, will quarry and remove the material between the sides of the gorge and the base upon which the limbs of the Bridge rest?

May it not be found with reasonable scientific certainty that water will enter the contact between the sandstones?

Defendants' geologist Hansen writes (p. 14): "Reservoir water would bypass the barrier dam chiefly by descending joints from the Navao sandstone to the Kayenta formation, or by entering the Kayenta directly at canyon-floor level, and passing laterally along bedding planes through the Kayenta to the upstream part of Bridge Canyon. *The abundance of existing seepage in the upper part of Kayenta leaves little doubt of its capacity to transmit water.*"

May it not be found with reasonable scientific certainty that water deteriorates the cement between the sandstone particles and hastens rock erosion?

Defendants' geologist Hansen notes (p. 7): "In some places, where the cementing material is chiefly calcite, the rock (Kayenta) is somewhat friable * * *."

May it not be found that there is a reasonable probability that the consequences of flooding the Bridge will be disastrous?

As bad as this situation appears to be, defendants' fieologist Hansen says Bridge Canyon will fill up with the sediments, the boulders, cobbles, etc. "Impoundment of water behind Glen Canyon dam will impose an artificial base level on Bridge Creek within the boundaries of the national monument *whether a barrier dam is constructed downstream*

or not. The effect of such a base level will be to cause sediments which normally are flushed through the canyon to the Colorado River to accumulate within the monument."

"Unless diverted out of Bridge Canyon via the proposed diversion dam and tunnel to Aztec Creek, sediment consisting of boulders, cobbles, gravel, sand, silt and driftwood, therefore, would accumulate ultimately throughout the length of Bridge Creek in the monument up to the high-water level of the reservoir at an altitude of 3,700 feet and in fact to greater heights as the deposits would gradually aggrade headward. Aside from the detrimental effect such sediments would have on the natural appeal of the monument, they would in time reduce the effective height of Rainbow Bridge by approximately 50 feet."

And, finally, may it not be found with reasonable certainty that, if plaintiffs, both clubs and their members, and the individual, the wilderness guide, are found to have made the requisite use of the Rainbow Bridge Monument as an element of the concept of standing, most assuredly such use would be significantly affected by the proposed actions of the defendants Morton and Armstrong and of the intervenors?

Defendants, the Secretary of the Interior and the Commissioner of the Bureau of Reclamation, and intervenors, the States of Colorado and Utah and numerous state and regional water conservancy districts contend (1), that this suit cannot be maintained because plaintiffs lack standing to sue, (2), that this is an unconsented suit against the United States, (3), that certain indispensable parties have not been joined, (4), that even if the suit is proper, plaintiffs cannot prevail because § 3 was never intended to apply to Rainbow Bridge Monument and Glen Canyon Dam, and (5), in the alternative, even if § 3 is applicable, that it has been repealed by implication and is not enforceable. Since defendants and intervenors join in all of the arguments interposed by one another, hereinafter for the purpose of convenience they will all be referred to as defendants.

Standing

The United States Supreme Court in its recent decision in Sierra Club v. Morton, 405 U. S. 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972), reviewed its cases on the standing question in environmental protection cases. It is believed that all three of the petitioners here have standing within the *Sierra Club* rule.

The Sierra Club purposefully set out to enlarge the public's right to sue the Federal government. They desired a test case on the standing issue and argued that its status as a membership organization with a special interest in the conservation and sound management of the national parks, game refuges and forests of the country gave them sufficient standing to sue on behalf of the general public.

The Club did not "allege that it or its members would be affected in any of their activities or pastimes by the Disney development. Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents." 405 U. S. 727, 735, 92 S. Ct. 1361, 1366, 31 L. Ed. 2d 636.

No other plaintiffs—no individual or party directly affected by the project—were included in the suit. The Court says, footnote 8, pages 735-736, 92 S. Ct. page 1366: "In an *amici curiae* brief filed in this Court by the Wilderness Society and others, it is asserted that the Sierra Club has conducted regular camping trips into the Mineral King area, and that various members of the Club have used and continue to use the area for recreational purposes. These allegations were not contained in the pleadings, nor were they brought to the attention of the Court of Appeals. Moreover, the Sierra Club in its reply brief specifically declines to rely on its individualized interest, as a basis for standing. See n. 15 *infra*. Our decision does not, of course, bar the Sierra Club from seeking in the District Court to amend its complaint by a motion under Rule 15, Federal Rules of Civil Procedure."

The Supreme Court chose to adhere to the traditional notion of standing, which does not allow a group or individual the right to sue solely to protect "the public interest", and stated "The party seeking [a] review must have himself suffered an injury."

Friends of the Earth do not use this suit to test the issue of standing. They do not, as Sierra did, specifically decline to rely on its individualized interest, as a basis for standing. 405 U. S. 727, 7v5-736, 92 S. Ct. 1361, 31 L. Ed. 2d 636, Note.

Friends of the Earth do state in their pleadings that its members use Rainbow Bridge and the National Monument site, and that they use them in a way that will be significantly affected by the actions of the defendants. The averment is "A number of F. O. E.'s members periodically visit and enjoy the use of Rainbow Bridge and the monument site." Also, *infra.*

Other plaintiffs directly affected by the defendants' actions are included in the suit with Friends of the Earth:

Wasatch Mountain Club, Inc., a membership corporation of some 700 members headquartered in Salt Lake County, Utah, whose purposes include recreation, preservation of the environment, and educational programs regarding the out-of-doors, alleges that, "Several of W. M. C.'s members periodically visit and enjoy the use of Rainbow Bridge National Monument and W. M. C. organizes frequent trips to Rainbow Bridge and the surrounding area each summer."

Also, Kenneth G. Sleight, the third plaintiff, conducts tours along the Green and Colorado Rivers in Utah and Arizona. Plaintiff Sleight has a special use permit to conduct guided tours in the Glen Canyon National Recreational Area, and in his capacity as tour guide, he has conducted several tours to Rainbow Bridge. He lives in the general area and there can be no question that Sleight has standing to sue in this case. He falls precisely within that category of actual users defined by the Court in *Sierra Club*

as being proper persons to sue to enforce a statute protecting the existing state of the place used.[4]

It is not necessary for the court to express an opinion whether § 3 may protect any economic interest claimed here by plaintiff Sleight. Perhaps insofar as Sleight has and uses a valid license to conduct tours in the Monument —that is, has and uses a permit to exploit the protected natural state of the Monument—he has some economic interest in maintaining the status quo of the Monument that springs out of the same purpose as that of § 3 to keep the place free of man-made encroachments, and thus comes within the protection of § 3. However, that may be, no one can gainsay that a man who chooses to make his living leading tours into such a place as Rainbow Bridge Monument has an interest in the aesthetic, conservational and recreational values of the place, and plaintiff Sleight's claim of standing may be sufficient if he urges those interests only.

There would also seem to be little question as to the standing of plaintiff Wasatch Mountain Club, which organizes trips on behalf of its members to Rainbow Bridge Monument each summer. In its opinion in the appeal of *Sierra Club*, the Ninth Circuit, in finding that the Club lacked standing to sue because it failed to allege actual use of Mineral King by its members, distinguished the standing that might be alleged by "local conservation organizations made up of local residents and users of the area."[5] The Supreme Court affirmed and maintained the same distinction.[6] Since the summer months are those most suitable for trips into the Rainbow Bridge area, it appears that an allegation that visits are made each summer is sufficient indication of use as to confer standing.

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[4] 405 U. S. 727, 735-737, 92 S. Ct. 1361, 31 L. Ed. 2d 636.

[5] Sierra Club v. Hickel, 433 F. 2d 24, 33, aff'd sub nom Sierra Club v. Morton, 405 U. S. 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636.

[6] 405 U. S. 727, 735, note 8, 92 S. Ct. 1361, 31 L. Ed. 2d 636, and accompanying text: 405 U. S. 727, 738-739, note 14, 92 S. Ct. 1361, 31 L. Ed. 2d 636, and accompanying text.

Plaintiff Friends of the Earth is a national conservation group, but alleges that a number of its members periodically visit and enjoy Rainbow Bridge Monument. It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review.[7] Such members of Friends of the Earth as visit the Monument are members of the organization for the purpose of furthering such interests as lead them to visit the Monument, hence it is not inappropriate that the organization should represent them here.[8] It is not alleged how many of the members of Friends of the Earth visit Rainbow Bridge Monument, or with what frequency, but the allegation that a number visit "periodically", whether it is taken to mean that there are some members who have made more than one visit or that there have been single trips by many individual members, indicates on the part of the membership of Friends of the Earth a continuing, substantial interest in the Monument. It would not appear to offend the Sierra Club Rule to accord standing to an organization which in encouraging and developing the conservational and environmental interests of its members may have sponsored in some degree each of a number of single visits by its members. Particularly would that seem to be an appropriate interpretation of the rule with regard to a monument as inaccessible as this one. The white population of the Navajo country, according to official estimates for 1912, numbered 521 and included government officials, traders, and missionaries living at widely separated places, Gregory, Professional Paper 93, 1917, pp. 9 and 14.

Friends of the Earth allege that they are a membership organization "dedicated to the preservation, restoration, and rational use of the environment in the United States and throughout the world. In furtherance of its purposes F. O. E. engages in a variety of educational programs and in legislative and other activities. F. O. E. is particularly interested in preserving the integrity of national parks and mon-

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[7] 405 U. S. 727, 739, 92 S. Ct. 1361, 31 L. Ed. 2d 636, *citing* NAACP v. Button, 371 U. S. 415, 428, 83 S. Ct. 328, 9 L. Ed. 2d 405.

[8] See 405 U. S. 727, 738, note 14, 92 S. Ct. 1361, 31 L. Ed. 2d 636.

uments such as Rainbow Bridge National Monument. A number of F. O. E.'s members periodically visit and enjoy the use of Rainbow Bridge and the monument site."

The complaint contains other allegations, and there is evidence in the record, that shows that the members of F. O. E. use Rainbow Natural Bridge and the monument site in ways that would be significantly affected if the Glen Canyon Reservoir is allowed to rise to a level which permits the waters to enter the boundaries of the National Monument and flow under the Bridge.

Glen Canyon Reservoir, known as Lake Powell, would reach an elevation of 3,700 feet above sea level if allowed to fill to its maximum capacity. At a lower level, 3,606 feet, it will invade Rainbow Bridge National Monument. At 3,645 feet, Lake Powell will reach Rainbow Bridge itself, and at 3,700 feet, the depth under Rainbow Bridge will be 48 feet. By using additional storage preserved for Flood Control purposes, the height of Lake Powell may eventually reach 3,711 feet, or a depth of 59 feet under Rainbow Bridge. The foregoing figures are taken from Administrative Report of Geologist Wallace R. Hansen, Bureau of Reclamation, a geologic examination of Rainbow Bridge National Monument, submitted to the Commissioner on January 15, 1971, attached as Exhibit "B" to Affidavit of David L. Crandall, filed in the United States District Court, District of Utah, on January 4, 1972.

Plaintiffs' Exhibit 2, Utah, in the case at bar, No. C 116-1, is an aerial view showing the waters of Lake Powell within the Monument and very close to Rainbow Bridge on July 19, 1971.

The plaintiffs allege that damage to Rainbow Bridge from fluctuating standing water beneath it will occur. The destruction of natural vegetation, the waterlines left on the canyon walls during reservoir drawdown, and the reduction in the height above water of Rainbow Bridge by the height of the water beneath will impair the monument. Constant wetting and drying and thawing and freezing the foundation sandstone supporting Rainbow Bridge may over time

weaken the structure of the bridge to a point where it may crumble.

The plaintiffs further allege that defendants have violated, are now violating, and unless the relief requested is granted, will continue to violate, the Colorado River Storage Project Act in that they have failed to take adequate protective measures to preclude impairment of Rainbow Bridge National Monument in violation of Section 1 of said Act. Unless the relief requested is granted defendants will also be in violation of Section 3 of said Act in the very near future by allowing Glen Canyon Reservoir to be within Rainbow Bridge National Monument.

Impairment of Rainbow Bridge National Monument can be prevented immediately by limiting the maximum level of Lake Powell to a height of 3,600 feet above mean sea level.

There is no doubt at this time that one who alleges injury in fact, due to administrative action of a federal officer, to an interest which reflects aesthetic, conservational, recreational or economic values arguably within the zone of interests protected by a statute, has standing to sue for redress in this court.[9] The crucial question of injury in fact under this rule is not one of magnitude of injury. In that regard, all that need be asked is whether the act said to result in injury is one proscribed by the statute. The crux of injury in fact is whether plaintiff has an interest of such magnitude that injury to it is judicially cognizable.

The question remains whether plaintiffs' interests in the aesthetics, conservational and recreational values of Rainbow Bridge Monument are protected by Section 3 of the Storage Project Act. That question is readily answered. The national parks and monuments were set aside, free from the encroachments of civilization, specifically for aesthetic,

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[9] Association of Data Processing Service Organizations v. Camp, 397 U. S. 150, 90 S. Ct. 827, 25 L. Ed. 2d 184; Sierra Club v. Morton, *supra*.

recreational and conservational purposes. Section 3 was added to the Storage Project Act at the insistence of conservation groups in order to preserve the national policy with regard to the national parks and monuments. It is hardly subject to doubt that the purpose of a prohibition against man-made dams and reservoirs within national parks and monuments is to continue and protect the policy of preserving the aesthetic, recreational and conservational values inherent in the natural state of these places.

It is appropriate at this point to detail the important part played by the conservationists in the legislative history of the provisions of the Storage Project Act in issue here. Early versions of the Storage Project Act called for the construction of Echo Park Dam and Reservoir in Dinosaur National Park, and Glen Canyon Dam and Lake Powell, part of which would intrude into Rainbow Bridge National Monument. A coalition of national conservationist groups formed in opposition to the bill as thus drafted, and took the position before Congress that the national policy of preventing man-made encroachments upon national parks and monuments required deletion from the Storage Project Act of the Echo Park proposal and limitation of the Glen Canyon proposal so as to keep Lake Powell out of Rainbow Bridge Monument. The conservationists gained sufficient support in Congress to stop passage of the Act entirely.[10] with the result that the proponents of the Act were forced to concede deletion of the Echo Park proposal and addition to the Act of Sections 1 and 3 quoted at the beginning of this opinion in exchange for withdrawal by the conservationists of their opposition to passage of the Act.[11]

The conservationists and the proponents of the Act viewed the accommodation they had reached as a mutual and binding agreement, and they portrayed it to the mem-

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[10] See, *e. g.*, Hearings before the Subcommittee of the Committee on Appropriations, Senate, 87th Cong., 1st Sess., at 64 (John A. Cover); *Id.* at 617-621 (Howard Zahniser); *Id.* at 627-628 (Spencer M. Smith).

[11] See Cong. Rec., Vol. 102, Pt. 3, 84th Cong., 2d Sess., at 3475 (Representative Aspinall); Cong. Rec., Vol. 102, Pt. 5, 84th Cong., 2d Sess. at 5737 (Senator Anderson).

bers of Congress as such. The agreement is set forth most clearly in the following letter from leaders of the conservationists to Representative Aspinall of Colorado. The letter appears in explanation of the amendments to the Act in a Supplemental Report of the Committee on Interior and Insular Affairs of the House of Representatives.

January 23, 1956

Hon. Wayne N. Aspinall
House of Representatives
Washington, D. C.

Dear Mr. Aspinall:

Congressmen from the upper Colorado Basin States and prospective Senate conferees have guaranteed the Nation's conservationists that the Echo Park Dam "will not be reinserted" into the upper Colorado bill when it comes up for action in this session of Congress, and the administration has also reversed its former stand on this matter and has agreed to drop the Echo Park proposal.

Furthermore, we have now been assured that the following two provisos will be added, in their appropriate places, to H. R. 3383 when it reaches the floor of the House and that Senator Anderson and other prospective Senate conferees will support that inclusion of these two provisos:

1. *Provided further*, That as part of the construction, operation and maintenance of the Glen Canyon unit the Secretary of the Interior shall take adequate protective measures to preclude impairment of the Rainbow Bridge National Monument.

2. It is the intention of Congress that no dam or reservoir constructed under the authorization of this act shall be within any national park or monument.

In view of these agreements we no longer op-

pose this bill. In fact, we also wish to commend the proponents of the project for the addition of these provisos, which we are glad to support as of great positive value to the cause of conservation, for they are a reaffirmation of the national park principle at a time when the national park system, in the minds of many, is in serious danger.

We who have led the fight against the Echo Park Dam are accordingly pleased to be able to take our present position.

Sincerely yours,

Horace M. Albright,
Trustee for Conservation
Ira N. Gabrielson,
Citizens' Committee on
Natural Resources
Howard Zahniser,
Council of Conservationists[12]

The House Committee Report said:

"The committee has received similar letters from the following: American Nature Association, the American Forestry Association, National Wildlife Federation, the Wilderness Society, National Parks Association, Izaak Walton League of America, Inc., Sierra Club, Wildlife Management Institute, General Federation of Women's Clubs, Conservation Education Association, and National Audubon Society."[13]

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[12] Supplemental Report to accompany H. R. 3383, 84th Cong., 2d Sess., at 11. The Supplemental Report also indicates that the Committee on Interior and Insular Affairs had received similar letters from the American Nature Association, American Forestry Association, National Wildlife Federation, Wilderness Society, National Parks Association, Izaak Walton League of America, Inc., Sierra Club, Conservation Education Association Wildlife Management Institute, General Federation of Women's Clubs, and National Audubon Society.

[13] *Id.*

Later, the Conference Report of the two Houses stated:

> "The matter of retaining intact our national park system was an important issue in the consideration by Congress of this legislation. The House approved bill—(1) deleting the Echo Park Storage unit, (2) requiring 'protective measures to preclude impairment of the Rainbow Bridge National Monument', and (3) expressing the 'intention of Congress that no dam or reservoir constructed under the authorization of this act shall be within any national park or monument,' . . . makes clear the intention of the House that there be no invasion or impairment of the national park system by the works authorized to be constructed under this legislation. The conference committee upheld the House position and adopted the House-approved language."[14]

Representative Aspinall said of the agreement:

> The legislation now before this committee (Committee on Interior and Insular Affairs, House) does not contain the controversial Echo Park unit. The substitute legislation proposed by the committee goes much further in that it provides "that as part of the Glen Canyon unit, the Secretary of the Interior shall take adequate protective measures to preclude impairment of the Rainbow Bridge National Monument"; and, further, "it is the intention of Congress that no dam or reservoir constructed under the authorization of this act shall be within any national park or monument." And may I here and now advise this committee that the sponsors of the legislation promise and agree with the Members of the House that they shall keep their agreement with the conservationists of the Nation in this particular.[15]

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[14] House of Representatives Report No. 1950, 84th Cong., 2d Sess. at 8.

[15] Cong. Rec., Vol. 102, Pt. 3, 84th Cong., 2d Sess., at 3510.

No serious problem of breach of this agreement by reauthorization of the Echo Park project ever arose because Echo Park was replaced in the bill by the alternative Flaming Gorge Dam and Reservoir, construction of which was begun shortly after passage of the Act. The keeping of the agreement with regard to construction of protective works for Rainbow Bridge Monument, however, passed largely into the hands of the appropriations committee of the House and Senate. The records of proceedings before these committees is the record of strenuous efforts by original proponents of the Act to prevent construction of the protective works.

The fight for the protection of Rainbow Bridge Monument was thus prolonged. The battle took two courses. In the appropriations committees, representatives of the Basin States, including proponents of the original Storage Project Act, opposed any appropriation for the construction of protective works for Rainbow Bridge Monument. Year after year, the appropriations committees recommended against the appropriation, and Congress followed these recommendations.[16] The conservationists also appeared in the appropriations committees hearings. They steadfastly maintained that failure to construct the protective works breached a good faith agreement, but, nevertheless, left the Section 3 prohibition in force.[17] Apparently in view of these protestations of the conservationists, joined in by officials of the Department of the Interior and the

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[16] See P. L. 86-700 (1961), 74 Stat. 743; P. L. 87-300 (1962), 75 Stat. 649; P. L. 87-880 (1963), 76 Stat. 1216; P. L. 88-257 (1964), 77 Stat. 844; P. L. 88-511 (1965), 78 Stat. 682; P. L. 89-299 (1966), 79 Stat. 1096; P. L. 89-698 (1967), 80 Stat. 1066; P. L. 90-147 (1968), 81 Stat. 471; P. L. 90-479 (1969), 82 Stat. 705; P. L. 91-144 (1970), 83 Stat. 323; P. L. 91-439 (1971), 84 Stat. 890; P. L. 92-134 (1972), 85 Stat. 365.

[17] See note 12, *supra*. See also Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 87th Cong., 1st Sess., at 493 (Dominy); *Id.* at 495 (Dominy); Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 87th Cong., 2d Sess., at 739-744 (Anthony Wayne Smith).

Bureau of Reclamation,[18] the Senators from Utah also instituted numerous bills calling for the repeal or limitation of Section 3 so as to permit flooding of the Monument.[19] All of these bills failed of passage.

Sovereign Immunity

Defendants invoke the doctrine of sovereign immunity and contend that this suit cannot be maintained because it is an unconsented suit against the United States.

There is no merit to this contention. This is not a suit against the sovereign; it is a suit against Ellis S. Armstrong and Rogers C. B. Morton, the individuals who have done the wrongful acts.

Section 3 of the Storage Project Act is a specific congressionally mandated limitation upon the authority of the defendants to fill Lake Powell to capacity. This limitation qualifies any provision in the Act that might be thought to give defendants authority to use Glen Canyon Dam to capacity, as defendants propose to do.

Section 3 is a singularly strong provision: "It is the intention of Congress", etc., as if to say, "and you'd better believe it!"

It seems never to have been supposed that sovereign immunity would bar a suit such as the present in which plaintiff seeks to enjoin breach by an officer of the

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[18] See Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 86th Cong., 2d Sess., at 518 (Commissioner Dominy, Bureau of Reclamation); Hearings before the Subcommittee of the Committee on Appropriations, Senate, 86th Cong., 2d Sess., at 622 (Dominy); Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 87th Cong., 1st Sess., at 491 (Dominy); *Id.* at 493 (Dominy); Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 87th Cong., 2d Sess., at 4 (Secretary of the Interior Udall); Hearings before the Subcommittee of the Committee on Appropriations, Senate, 87th Cong., 2d Sess., at 54 (Secretary Udall).

[19] See S. 1188 (1960); S. 3180 (1960); S. 175 (1961); S. 333 (1963); S. 1555 (1967); S. 307 (1969).

sovereign of a specific limitation on his authority to act. Courts have been granting relief by way of mandamus in such cases ever since Marbury v. Madison, 5 U. S. (1 Cranch) 137, 2 L. Ed. 60 (1802) (" . . . where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.").

Defendants rely upon Larson v. Domestic and Foreign Commerce Corp., 337 U. S. 682, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949), and Malone v. Bowdoin, 369 U. S. 643, 82 S. Ct. 980, 8 L. Ed. 2d 168 (1962).

Their reliance is misplaced. The United States Supreme Court in *Larson, id.*, 337 U. S. pages 701-702, 69 S. Ct. page 1467 said, "* * * we adhere to the rule * * * and to the principal which has been frequently repeated by this Court * * *: the action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so 'illegal' as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void."

The court in Malone v. Bowdoin, *id.*, 369 U. S. p. 647, 82 S. Ct. p. 983, referring to *Larson* said:

"Cutting through the tangle of previous decisions, the Court expressly postulated the rule that the action of a federal officer affecting property claimed by a plaintiff can be made the basis of a suit for specific relief against the officer as an individual only if the officer's action is 'not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.' 337 U. S., at 702, 69 S. Ct. at 1467. Since the plaintiff had not made an affirmative allegation of any relevant statutory limitation upon the Administrator's powers, and had made no claim that the Administrator's action amounted to an unconstitutional

taking, the Court ruled that the suit must fail as an effort to enjoin the United States.

"While not expressly overruling United States v. Lee, *supra* [106 U. S. 196, 1 S. Ct. 240, 27 L. Ed. 171], the Court in *Larson* limited that decision in such a way as to make it inapplicable to the case before us. Pointing out that at the time of the *Lee* decision there was no remedy by which the plaintiff could have recovered compensation for the taking of his land, the Court interpreted *Lee* as simply 'a specific application of the constitutional exception to the doctrine of soverign immunity.' 337 U. S. at 696, 69 S. Ct. at 1464. So construed, the *Lee* case has continuing validity only 'where there is a claim that the holding constitutes an unconstitutional taking of property without just compensation.' *Id.*, at 697, 69 S. Ct. at 1465.

"No such claim has been advanced in the present case. Nor has it been asserted that the petitioner was exceeding his delegated power as an officer of the United States in occupying the land in question, or that he was in possession of the land in anything other than his official capacity. This suit, therefore, is not within the class of cases in which, under *Larson*, specific relief can be obtained against a government officer." Justice Douglas' dissent is interesting.

In the present case plaintiffs affirmatively allege an explicit statutory limitation upon the powers of defendants Armstrong and Morton. The *Larson* case makes the same distinction again, *id.* p. 691, 69 S. Ct. p. 1462:

"* * * There was no claim made that the Administrator and his agents, etc., were acting unconstitutionally or pursuant to an unconstitutional grant of power. Nor was there any allegation of a limitation on the Administrator's delegated power to refuse shipment in cases in which he believed the United States was not obliged to deliver. There was, it is true, an allegation that the administrator was acting 'illegally,' and that the refusal was 'unauthorized.' But

these allegations were not based and did not purport to be based upon any lack of delegated power.[12]"

[12] This case must, therefore, be clearly distinguished from cases like Noble v. Union River Logging R. Co., 147 U.S. 165, 13 S.Ct. 271, 37 L.Ed. 123 (1893). In that case, it was held that the officer being sued lacked power to refuse delivery because, under the statutory scheme, his predecessor's determination that the plaintiff was entitled to delivery was binding. A similar case would be presented here if the statute expressly provided that the Administrator's interpretations of contracts should be binding and irrevocable and if a later, or subordinate, official refused to follow a prior binding interpretation. In such a case the issue would not be the correctness or incorrectness of the later decisionunder general law but simply the power of the official, under the statute, to make a decision at all. Cf. Ickes v. Fox, 300 U.S. 82, 57 S.Ct. 412, 81 L.Ed. 525 (1937)."

The cases from Marshall's decision in Osborn v. Bank, 22 U. S. (9 Wheat.) 738, 6 L. Ed. 204 (1824), in which the great central principle was: where the plaintiff complained that a state officer had inflicted a trespass contrary to the Constitution or Statutes of the United States, he could have relief, through United States v. Lee, 106 U.S. 196, 1 S. Ct. 240, 27 L.Ed. 171 (1882); Ickes v. Fox, 300 U.S. 82, 57 S.Ct. 412, 81 L.Ed. 525 (1937); Goltra v. Weeks, 271 U.S. 536, 46 S.Ct. 613, 70 L.Ed. 1074 (1926); Philadelphia v. Stimson, 223 U.S. 605, 32 S.Ct. 340, 56 L.Ed. 570 (1912); Land v. Dollar, 330 U.S. 731, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947) to Larson v. Domestic & Foreign Commerce Corp., and Malone v. Bowdoin are analyzed in 77 Harvard Law Review p. 21 (1963-64), by Professor Jaffe. The article is illuminating and helpful.

Indispensable Parties.

Two of the states of the Upper Basin of the Colorado River, Colorado and Utah, have intervened in this action. Three of the Upper Basin states, Wyoming, New Mexico, and Arizona, are not in the action. Defendants contend that Wyoming and New Mexico, as beneficiaries

of the Upper Colorado River Basin Fund,[20] are indispensable parties to this suit, and, thus, that the suit must be dismissed since, as sovereigns, Wyoming and New Mexico will not consent to it.

Defendants' contention suggests some interesting questions regarding the interest of the Upper Basin states in the outcome of this suit, and an interesting conflict between the eminently equitable standard of Rule 19 of the Federal Rules of Civil Procedure (setting forth criteria for defining indispensible parties) and the doctrine of sovereign immunity, which brooks no equities. It is not necessary, however, to reach these problems in arriving at an answer to defendants' contention.

As pointed out earlier, a suit to enjoin acts of an officer is not to be regarded as a suit against the sovereign where the acts complained of are alleged to be in violation of a statute of the sovereign limiting the authority of the officer to act. There is no pretense here that Section 3 of the Storage Project Act, the federal statute in question, is not the law of any of the Upper Basin states: the federal statute binds the sovereignty of the states. Because this is a suit to enjoin acts of the Secretary and the Commissioner claimed to be in violation of a statute as much the law of the Upper Basin states as if their state legislatures had passed it, this is no more a suit against the sovereignty of the Upper Basin states than it is a suit against the sovereignty of the United States, and none of the Upper Basin states is any more an indispensible party to this suit than the United States is.

Section 3 is applicable to Glen Canyon Dam and Rainbow Bridge Monument.

Defendants have raised no serious question about the applicability of § 3 to Glen Canyon Dam and Rainbow Bridge Monument. The section is applicable by its terms, and defendants offer nothing which shows that the terms do not mean what they say. Additionally, there is a great deal

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[20] See Article V, Colorado River Compact.

of extrinsic evidence indicating that the section applies to the Dam and the Monument.

Defendants say that only § 1 was intended to apply to Rainbow Bridge Monument, and that § 3 was intended to apply—apparently *in futuro*—to a project called Echo Park Dam, which eventually was not authorized by the Storage Project Act, and to certain other dams and reservoirs which were authorized. The legislative history of the Storage Project Act seems entirely contrary to what defendants contend.

As noted earlier, sections 1 and 3 were added to the Storage Project Act upon agreement between proponents of the Act and conservation groups. The conservationists first insisted that authorization for Echo Dam and reservoir be removed from the Act because the dam and reservoir would have been within Dinosaur National Park. Echo Park was removed from the bill, but the conservationists continued to insist that § 3 be included. Defendants say this insistence on § 3 was to prevent future reauthorization of Echo Park and development of authorized dams and reservoirs in such a way that they might come within a national park or monument. Defendants agree, however, that none of the authorized dams and reservoirs, save Glen Canyon Dam and Lake Powell, were originally proposed to be located in such proximity to a national park or monument as to be seriously threatening,[21] and Echo Park Dam and reservoir were replaced in the bill by Flaming Gorge Dam and reservoir, construction of which was begun shortly after passage of the Act. Thus, while it is plausable that § 3 was intended

[21] See also Cong. Rec., Vol. 102, Pt. 3, 84th Cong., 2d Sess., p. 3475 (testimony of Representative Aspinall):

> The bill, consideration of which would be in order upon the approval of the resolution now before us, does not authorize, or even contemplate, the construction of any facility having an adverse effect on any area reserved as a national park or national monument. On the other hand, the legislation as approved by the committee specifically provides for the protection of the Rainbow Bridge National Monument should it be endangered by the construction of the Glen Canyon unit. It goes even further and provides that it is the intention of Congress that no dam or reservoir constructed under the authorization of this act shall be in any national park or monument.

to apply peripherally for the purposes defendants allege, in addition to its applicability to Rainbow Bridge Monument, it is not plausible that the section was intended to apply exclusively as defendants allege and not to Rainbow Bridge Monument. There are numerous statements of conservationists and government officials in hearings relative to the Act which specifically recognize the applicability of §3 to Glen Canyon Dam and reservoir and Rainbow Bridge Monument.[22] Between 1960 and 1969, Utah's Senators Bennett and Moss introduced into the Senate a total of 6 bills, the effect of which would have been to repeal or limit § 3 so as to permit the flooding of Rainbow Bridge Monument.[23] The lack of support in Congress for repeal of section 3 of the Storage Project Act is shown by the inability of the sponsors of these six bills to get them enacted.

Moreover, it affirmatively appears that § 1 was not proposed by the conservationists as the exclusive means of protecting Rainbow Bridge Monument. Section 1 apparently was first proposed by the Bureau of Reclamation, after the conservationists began to insist on the removal of

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[22] See Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 86th Cong., 2d Sess., at 518 (Commissioner Dominy, Bureau of Reclamation); Hearings before the Subcommittee of the Committee on Appropriations, Senate, 86th Cong., 2d Sess., at 622 (Dominy); Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 87th Cong., 1st Sess., at 491 (Dominy); *Id.* at 493 (Dominy); Hearings before the Subcommittee of the Committee on Appropriations, Senate, 87th Cong., 1st Sess., at 614-615 (John A. Cover, Secretary and Member, Board of Trustees, National Parks Association); *Id.* at 619-620 (Howard Zahniser, Executive Secretary and Editor, The Wilderness Society, and original signatory of the conservationist agreement); *Id.* at 628 (Dr. Spencer H. Smith, Jr. Secretary, Citizens Committee on Natural Resources); *Id.* at 627 (J. W. Penfold, Conservation Director, Isaak Walton League); Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 87th Cong., 2d Sess., at 4 (Secretary of the Interior Udall); Id. at 739 (Anthony Wayne Smith, Attorney); *Id.* at 751-752 Senator Magnusson); Hearings before the Subcommittee of the Committee on Appropriations, Senate, 87th Cong., 2d Sess., at 54 (Secretary Udall).

[23] See Note 21, *supra.*

Echo Park and the inclusion of § 3, and for the apparent purpose of authorizing a means of avoiding the effects of § 3 on Glen Canyon Dam and reservoir.[24] Perhaps the Bureau of Relamation, before passage of the Act, entertained the notion of limiting the height of Glen Canyon Dam, and perhaps as much as would keep the waters of Lake Powell out of the Monument. However that may be, it appears that after the Bureau finally decided to construct a dam of 3,700 feet, they proposed § 1 to the conservationists and proponents of the Act, and the conservationists thereafter sought inclusion of § 1 in the Act. This chronology, and the source of § 1 indicates as clearly as anything might that § 3 was intended and understood to apply to Glen Canyon Dam and reservoir. The fact that after § 1 was included in the Act both conservationists and government officials continued to observe that § 3 would apply to limit the height of Lake Powell indicates that § 1 was not understood as a quid pro quo for waiving the effect of § 3 with regard to Glen Canyon Dam and reservoir.[25]

The immediately preceding also disposes of defendants' contention that limiting the height of Lake Powell to the extent that might be necessary to protect Rainbow Bridge Monument is too untoward a result to have been contemplated in the passage of § 3. Plainly, that result was in fact contemplated.

Implied Repeal.

Decision of this case turns upon the viability

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[24] See Hearings before the Subcommittee of the Committee on Appropriations, 87th Cong., 1st Sess., at 617-621 (Howard Zahniser); *Id.* at 621-626 (extract, testimony of representatives of the Bureau of Reclamation at the time of the original conservationist agreement); *Id.* at 627 (letter from Izaak Walton League of America to Carl Hayden, re: Bureau of Reclamation proposal of Section 1). See also Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 87th Cong., 2d Sess., at 707 (Rep. Aspinall). House of Representatives Report 1087, Part 2, 84th Cong., 2d Sess., is not contra insofar as it indicates only that the *language* of the Section 1 proviso was the conservationsts'.

[25] See Note 24, *supra.*

of defendants' suggestion that Section 3 of the Storage Project Act has been repealed by implication. It is the universal rule that implied repeals are disfavored, and will not be found unless the intent of the legislature to repeal is manifest.[26] That is, an implied repeal may be found only where a later act covers the whole subject matter of an earlier, and it is clearly the intent of the legislature to substitute the second for the first, or where a later act is so repugnant to and earlier that it is impossible to give effect to both.[27] Whenever possible, nominally inconsistent acts will be construed together and effect will be given to both.[28]

Defendants say that this Court can ignore the explicit statement of legislative intent in Section 3 of the Storage Project Act because the Court can infer from amendments and additions to the Act an intent of Congress that Lake Powell be filled to capacity notwithstanding encroachment upon national parks and monuments. The doctrine of implied repeals, however, authorizes no breaches in the ancient rule that the judgment of the court will not be substituted for that of the legislature. Where the intent of the legislature has been made explicit, judicial construction ends.[29] All that is authorized by the doctrine of implied repeals is that where the legislature has made a second,

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[26] *E. g.*, United States v. Borden Co., 308 U.S. 188, 198, 60 S.Ct. 182, 84 L.Ed. 181 (1939); Posadas v. National City Bank, 296 U.S. 497, 503, 56 S.Ct. 349, 80 L.Ed. 351 (1935). See also City of Tulsa, Okla. v. Midland Valley R. Co., 168 F.2d 252 (10th Cir. 1948); In re Bear River Drainage District, 267 F.2d 849 (10th Cir. 1959).

[27] *E. g.*, *Posadas, supra;* District of Columbia v. Hutton, 143 U.S. 18, 26-27, 12 S.Ct. 369, 36 L.Ed. 60 (1891).

[28] *E. g.*, District of Columbia v. Hutton, *supra;* Rosenberg v. United States, 346 U.S. 273, 294, 73 S. Ct. 1152, 97 L.Ed. 1607 (1953). See also Bartlett v. United States, 166 F.2d 920 (10th Cir. 1948).

[29] *E. g.*, Thompson v. United States, 246 U.S. 547, 551, 38 S.Ct. 349, 62 L.Ed. 876 (1918); Gorin v. United States, 111 F.2d 712, 719 (9th Cir. 1940), aff'd 312 U.S. 19, 61 S.Ct. 429, 85 L.Ed. 488. reh. den. 312 U.S. 713, 61 S.Ct. 617, 85 L.Ed. 1144; Salich v. United States, 111 F. 2d 712, 719 (9th Cir. 1940); aff'd 312 U.S. 19, 61 S.Ct. 429, 85 L.Ed. 488, reh. den. 312 U.S. 713, 61 S.Ct. 618, 85 L.Ed. 1144. See also Federal Land Bank of Wichita, Kansas v. Howell, 123 F. 2d 50 (10th Cir. 1941).

equally explicit, contrary statement of its intentions with regard to a subject, the court may apply the second act and treat the first as repealed.

The above, in the context of the present case, means that this Court must treat Congress' express statement of its intentions in Section 3 of the Storage Project Act as dominant over and controlling mere inconsistencies in later enactments. Thus, if defendants are to prevail here, it cannot be enough for them to show that Congress authorized construction of Glen Canyon Dam in such a way that its operation *might* flood Rainbow Bridge Monument. It would be necessary to show—at least— that Congress had affirmatively required the operation of the Dam in such a way that Rainbow Bridge Monument must be flooded. Thus, it cannot be enough to show that there have been constructed upon congressional authorization other dams and reservoirs that *might* use waters which would be available if Glen Canyon Dam were operated in such a way that Rainbow Bridge Monument were flooded. It would be necessary to show—at least—that Congress had affirmatively required the use of such waters at such dams and reservoirs.

Against any such showing defendants can make must be counted the fact that on six occasions from 1960 to 1969 Congress was presented bills to repeal Section 3, but declined to enact any of them.[30] In a case in which Congress had twice refused an express repeal, the Supreme Court held that, in view of such history, no implied repeal could be found.[31] Surely where, contemporaneously with any measures claimed to work an implied repeal, Congress has repeatedly refused an express repeal, to find an implied repeal would violate the cardinal rule that the intent of the legislature to repeal must be clear and manifest.

ORDER JUDGMENT AND DECREE

This cause came on for hearing on Motion of the plain-

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[30] See Note 21, *supra*, and accompanying text.

[31] Georgia v. Pennsylvania R. Co., 324 U.S. 439, 457, 65 S.Ct. 716, 89 L. Ed. 1051 (1944).

tiffs for Summary Judgment and on Cross-Motion of the defendants for Summary Judgment, pursuant to Rule 56, Federal Rules of Civil Procedure; the Court having considered the pleadings, files, records and evidence in the action, including the Stipulation of Agreed Facts dated January 14, 1972, the Affidavit of James Moorman, the Affidavit and Supplemental Affidavit of David L. Crandall, and the Affidavit of Felix L. Sparks appended to the Memorandum of the State of Colorado in Opposition to Motion for Summary Judgment; the Court having considered the briefs and the arguments of counsel; the Court, after a consideration of all of the foregoing and with a fuller view of the applicable law, and due deliberation having been had thereon, it is

Ordered that plaintiffs' Motion for Summary Judgment be and the same hereby is granted, and it is further

Ordered that defendants' Cross-Motion for Summary Judgment be and the same hereby is denied, and it is further

Ordered, adjudged and decreed:

1. That the plaintiffs have standing to bring this action;

2. That this action is not barred by the doctrine of sovereign immunity;

3. That there are no indispensable parties who have not been joined;

4. That this matter stands ready for final determination on the merits;

5. That Section 3 of the Colorado River Storage Project Act of 1956 (43 U.S.C. § 620b), by its clear expression of congressional intent, and as a matter of law, is applicable to the Rainbow Bridge National Monument and the Glen Canyon Dam.

6. That Section 3 of the Colorado River Storage Project Act of 1956 (43 U.S.C. § 620b) has not been repealed by implication;

7. That Section 3 of the Colorado River Storage Project Act of 1956 (43 U.S.C. § 620b) is still in full force and effect and forbids the intrusion of waters from Lake Powell and the Glen Canyon unit into the Rainbow Bridge National Monument;

8. That it is the statutory duty of Rogers C. B. Morton, the Secretary of the Interior, and Ellis L. Armstrong, the Commissioner of the Bureau of Reclamation, forthwith to remove all waters which have already intruded from Lake Powell and the Glen Canyon unit from the Rainbow Bridge National Monument and to prevent the waters from Lake Powell and the Glen Canyon unit from entering the boundaries of the Rainbow Bridge National Monument at all times in the future; and

9. That Rogers C. B. Morton, the Secretary of the Interior, and Ellis L. Armstrong, the Commissioner of the Bureau of Reclamation, their agents, servants and employees, and all persons in active concert and participation with them, are directed to take forthwith whatever actions are necessary to remove from within the boundaries of the Rainbow Bridge National Monument any waters of Lake Powell and the Glen Canyon unit impounded there, and to take forthwith such actions as are necessary to prevent any waters of Lake Powell and the Glen Canyon unit from entering within the boundaries of Rainbow Bridge National Monument and they, and each of them, are permanently enjoined and restrained from permitting or allowing the waters of Lake Powell and the Glen Canyon unit to enter or remain within the boundaries of the Rainbow Bridge National Monument.

ORDER DENYING DEFENDANTS' AND INTERVENORS' MOTION FOR STAY OF JUDGMENT PENDING APPEAL

The Court having heard evidence presented March 16th, March 27th, and April 2nd, 1973, by Defendants and Intervenors herein in support of their Motion for Stay of Judgment Pending Appeal, and having given due consideration to the same, and it appearing that Defendants and In-

tervenors have failed to show that they will be irreparably harmed if a stay is not granted, it is therefore

Ordered that Defendants' and Intervenors' Motion for Stay of Judgment Pending Appeal be, and the same is hereby denied.

MEMORANDUM IN SUPPORT OF ORDER DENYING DEFENDANTS AND INTERVENORS' MOTION FOR STAY PENDING APPEAL.

There is no dispute that 4,000,000 acre feet of water will be released from Lake Powell to comply with the Court's order. That has been the basis for the discussions. None of that water will be spilled over the spillway; all of it will go through the turbines and produce extra power.

The witness told us that "we are able to dispose of this extra energy now;" that they now have a market for the maximum generation of the Glen Canyon power plant. The market is not at depressed prices; it is meeting their average price of about 3 mills a kilowatt hour.

This spring, during April-July, the run-off is estimated at about 8.4 million acre feet, and that is very close to the normal over a period of record. We are looking at a normal year. That run-off also can be put through the turbines and there is a market for it at normal prices.

There is no dispute that the release of roughly 4,000,000 acre feet to comply with the Court's order will develop $4,700,000 of additional revenue. And there is no disadvantage in marketing the energy in April rather than in August. The witness: "No, not at this time. At this time we gain —."

There also is no dispute that the Upper Basin states receive credit for the flow of that 4,000,000 acre feet of water when it passes the division point, at Lees Ferry, 15 miles below Glen Canyon Dam. Under the terms of the Colorado River Compact, Upper Basin states have an obligation to release to Lower Basin states, and perhaps, Mexico, a ten year running total of about 75,000,000 acre feet.

Under the operating criteria that is about 8.23 million acre feet released each year to the Lower Basin. The 4,000,000 extra this spring will be stored in Lake Mead and be a payment or a credit against the amounts Upper Basin will owe Lower Basin. It won't have to be paid again; it is water in the bank. Both the extra revenue from sale of energy, and the credit against the continuing obligation to deliver water to the Lower Basin users are absolute, definite and certain advantages to the Upper Basin.

If 4,000,000 acre feet, additional acre feet, were released through the Glen Canyon turbines this year there would be no spill of the water at Hoover Dam this year; and there would be no cause for a spill at Davis or Parker Dams below Hoover.

Moreover, that 4,000,000 acre feet from Powell will produce electric energy again at Hoover Dam.

Standards for Decision:

The criteria for determining whether a motion for stay should be granted or denied are commonly formulated as follows:[32]

1. Has petitioner made a strong showing that he is likely to prevail on the merits of the appeal?
2. Has the petitioner shown that without a stay he will be irreparably injured?
3. Would the issuance of a stay substantially harm the other parties interested in the proceedings?
4. Where lies the public interest?

Lengthy discussion of criteria 1 and 4 is not necessary. The Court has previously determined that this suit is properly before it, and that the actions of defendants

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[32] See e. g., Virginia Petroleum Jobbers Assoc. v. Federal Power Comm'n, 104 U.S. App. D.C. 106, 259 F.2d 921 (1958); Associated Securities Corp. v. S. E. C., 283 F.2d 773 (10th Cir. 1960); Pitcher v. Laird, 415 F.2d 743 (5th Cir. 1969); Bauer v. McLaren, 332 F. Supp. 723 (D.C. Iowa 1971).

are in violation of federal statute. Those were not close decisions; the Court is not convinced that it is likely defendants and intervenors can prevail on appeal. Moreover, the statute here in question settles the matter of the public interest. That statute (Section 3 of the Colorado River Storage Project Act) and the earlier presidential proclamation of 1909 establishing Rainbow Bridge Monument make it clear that the public interest lies in preventing any and all encroachments upon the Monument. Presumably, however, Rules 8 and 62 do not intend that the District Court may refuse to stay its order upon precisely the same grounds as those on which it issued the order. For that reason, extensive consideration has been given herein to the question of irreparable harm to defendants and intervenors if the stay is not granted.

Damage to Defendants and Intervenors:

Defendants and intervenors here claim, and plaintiffs apparently do not disagree, that compliance with the Court's order will necessitate release by defendants through Glen Canyon Dam of approximately 4 million acre feet of water in the next few months. Defendants and intervenors initially claimed that this amount of water would be lost outright to them, both as an asset with which the Upper Basin states (of whom intervenors Utah and Colorado are two) might pay part of their obligation, under Article III of the Colorado River Compact and P. L. 90-537, to deliver water to the Lower Basin and Mexico, and as a source of electric power revenues which, under Article V of the Compact, are credited to the benefit of the Upper Basin states in the Upper Colorado River Basin Fund. Defendants and intervenors have since abandoned both of these claims.

Instead, defendants and intervenors now claim that they will be irreparably damaged by this release of water because it will so disrupt scheduled operation of Glen Canyon Dam as to result in a net loss of $2 million in power revenues over the next 3 to 4 years. They propose the figure of $2 million as the measure of their losses if the Court's order is not stayed.

It is immediately evident that there is here no claim of loss to the defendants, the Secretary of the Interior and the Commissioner of the Bureau of Reclamation. They own no interest in the Upper Basin Fund to which these additional power revenues would be credited. They are sued in their individual capacities; thus, they can enforce no claim of the United States to these power revenues. (It appears that Congress at any time could abolish the Upper Basin Fund and divert these monies to other purposes.) Moreover, the blanket claim of intervenors to all revenues that might enter the Upper Basin Fund must be discounted by one-third: 32.5% of the Upper Basin Fund belongs to Wyoming and New Mexico, but those states decline to present any claims in this action. In sum, defendants claim no damage here, and intervenors can claim only a part of the loss they allege will occur.

The risk of loss of power generating revenues results from the fact, according to defendants and intervenors, that water released through the turbines at Glen Canyon Dam when the Lake is at a lower elevation will produce less power than the same amount of water released when the Lake is at a higher level. This is said to be due to the difference in pressure on the turbines. Of course, release of 4 million acre feet of water through the Dam will lower the level of the Lake for some length of time. Defendants and intervenors say this time—the time it will take, if the Court's order is reversed, to recoup storage in the Lake to bring it back up to its level immediately prior to issuance of the order—will be 3 to 4 years. The loss in power revenues over this time, due to producing power by release of water at a lower Lake level, defendants and intervenors say will be $2 million. Plaintiffs have shown, however, by defendants' and intervenors' witness, that the efficiency of the turbines at Glen Canyon Dam is roughly equal when the level of Lake Powell is 3,606 feet above sea level (as required by the order) and when the Lake is at 3,650 feet above sea level (the average elevation over time if the order is not enforced). Defendants and intervenors make no effort to dispel the doubt this casts upon their argument. More-

over, plaintiffs say, defendants and intervenors have failed to substantiate their claim that recoupment of storage in Lake Powell will take 3 to 4 years. That is, plaintiffs would say that defendants and intervenors have not only failed to prove a quantum of damage, they have failed to show that any damage resulting would be irreparable.

The central problem of proof in this proceeding has been the problem of showing probable inflow of water into Lake Powell in the near future. Plaintiffs, and defendants and intervenors, do not disagree about predictions that have been made in the proceedings about the performance of Glen Canyon Dam and Lake Powell during the *current year*. These have been based upon *current data*, including measurement of precipitation and snowfall in the Upper Basin, and survey of existing and immediate power demand. For the purpose of showing probable performance in 1974, 1975 and 1976, however, expert witnesses for defendants and intervenors have adopted methods of prediction which, while they might be useful to administrators of the Upper Basin system of reclamation projects in making broad, general plans for long-term operations, are essentially useless to demonstrate short-term actual performance. They have used a method which condenses the extremely wide fluctuations and disparities of historical stream flows into a historical average, and this they have projected into the years 1974, 1975 and 1976 in order to predict actual performance in those years. Defendants' and intervenors' expert witness admits that the picture thus presented may prove to be wholly inaccurate. The question use of this method of proof presents, then, is not so much whether defendants and intervenors have carried their point by a preponderance of the evidence, but whether they have presented the Court with any evidence on their point at all.

Having been presented with an entirely artificial construct which bears no demonstrable resemblance to what may in fact occur, the Court is left to wonder whether, if actual inflow into Lake Powell in the next 3 to 4 years is as high as actual flows in the River near that point

in the past have proven that it can be, any loss of elevation in the Lake will be offset rapidly, rendering negligible any resulting loss of power revenues. For aught that has been shown here, this result is at least as likely as that the loss of power revenues due to enforcement of the Court's order will be $2 million.

Defendants and intervenors have not made an adequate showing of loss. While it is true that this Court may base judgment upon damages reasonably inferred from facts properly proven, the Court cannot rest its decision upon a showing of damages which is entirely speculative.[33]

Damages to Plaintiffs:

The Court's order of February 27th was issued to prevent damage to the interests of plaintiffs. Defendants and intervenors have offered nothing which shows that if the Court's order is stayed damage will not occur to the interests of plaintiffs.

The parties here agree, on the basis of current data, that if the Court's order is stayed scheduled operation of Lake Powell will bring waters of the Lake approximately 1,500 feet into Rainbow Bridge Monument at an elevation of approximately 1,500 feet into Rainbow Bridge Monument at an elevation of approximately 3,643 feet above sea level in the months of July and August. Thereafter, the water would recede, but the evidence does not make clear to what level. The intrusion this year will be approximately 900 feet further into the Monument than ever before. Of course, if the Court's order were stayed now but upheld on appeal defendants would be required at a later date to remove any water then within the Monument.

The question presented is whether this partial flooding of the Monument during the appeal time results

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[33] E. g., Bigelow v. R. K. O. Radio Pictures, Inc., 327 U.S. 251, 66 S. Ct. 574, 90 L.Ed. 652 (1956), reh. den. 327 U.S. 817, 66 S.Ct. 815, 90 L.Ed. 1040; Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931).

in any substantial damage to plaintiffs. Defendants and intervenors take the position that because the flooding would be temporary no permanent damage is in prospect, and that in any case the damage is negligible because it does not occur to the Bridge itself and because it largely duplicates the flooding of last year which the Court did not enjoin.

A showing of permanent damage is not required of plaintiffs, only a showing of substantial damage. Plaintiffs' interest in preserving the pristine condition of the Monument, founded in Section 3 of the Storage Project Act which forbids all intrusions of the Lake whatever, is clearly infringed by even a temporary intrustion of the Lake, and even if no permanent scars result. Plaintiffs' sole witness made it clear that even a temporary flooding substantially alters the aesthetic aspect of the Monument and interferes with the traditional use and enjoyment of the Monument, which has been to walk the course of Bridge Creek up to the site of the Arch. Moreover, this is not the first spring that the waters of Lake Powell, under the management of defendants and in flagrant violation of the clear mandate of Congress, have invaded the Monument. This is the third year. That is, the damage this year is cumulative and aggravates the damage previously caused.

Of course, it is of no moment that the flooding this year will not reach the Arch. It is not merely the Arch that is protected—not merely the Arch is which plantiffs have an interest. Moreover, it is of no moment that the Court did not enjoin a less extensive flooding last year. Defendants' and intervenors' apparent conclusion that because the Court did not hasten to a decision of this case last year the Court must regard partial flooding of the Monument as *de minimis* is simply mistaken and justifies no expectations on their part that the even more extensive flooding this year will not be enjoined.

Findings and Conclusions:

Defendants and intervenors have failed to make an adequate showing on any of the four criteria applicable

to the decision whether or not to grant a stay of judgment pending appeal. The Court is not convinced that defendants and intervenors are likely to prevail on appeal. Defendants and intervenors have made no showing beyond mere speculation that they will be irreparably harmed if the order is not stayed. Indeed, defendants cannot be understood even to have claimed that they will be injured. It clearly appears that the interests of plaintiffs will be damaged if the order is not enforced. Indeed, the allegations of defendants' motion with regard to injury to plaintiffs may be taken as an admission that injury will ensue. Finally, Congress has long since settled that the interest of the public herein lies in protecting the Monument at all times.

[Illustrations accompanying the District Court opinion have been omitted.]

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MAY 1973 TERM

FRIENDS OF THE EARTH, WASATCH MOUNTAIN CLUB, INC., and KENNETH G. SLEIGHT,

Plaintiff-Appellees,

v.

ELLIS L. ARMSTRONG, Commissioner, Bureau of Reclamation, and ROGERS C. B. MORTON, Secretary of the Interior,

Defendants-Appellants,

STATE OF COLORADO, STATE OF UTAH, COLORADO RIVER WATER CONSERVATION DISTRICT, SOUTHWESTERN WATER CONSERVATION DISTRICT, INTER-MOUNTAIN CONSUMER POWER ASSN., NORTHERN DIVISION POWER ASSN., INC., CENTRAL UTAH WATER CONSERVANCY DISTRICT, and COLORADO-UTE ELECTRIC ASSOCIATION,

Defendants-Intervenors-Appellants.

Nos. 73-1223, 73-1278, 73-1279, 73-1280, 73-1281, 73-1282, 73-1283 (Consolidated)

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

SETH, Circuit Judge

These suits were commenced in the United States District Court for the District of Columbia, and transferred to the District of Utah. They are in the nature of mandamus,

and seek also injunctive and declaratory relief. The initial defendants were the Secretary of the Interior and the Commissioner of the Bureau of Reclamation. The plaintiffs seek to have these officials take such action as may be necessary to prevent the water being impounded in Lake Powell from spreading into any part of Rainbow Bridge National Monument.

The plaintiffs are Friends of the Earth, a nonprofit membership corporation organized under the laws of New York. The purposes of this corporation include the "preservation," "restoration," and "rational use" of the environment in the United States and throughout the world. The plaintiff, Wasatch Mountain Club, Inc., is a nonprofit membership corporation organized under the laws of Utah with purposes similar to those of Friends of the Earth. The individual plaintiff is Kenneth G. Sleight of Utah who is head of a corporation which conducts for profit river tours and other tours including those to Rainbow Bridge. We hold the defendants have standing to bring this action.

The intervenors-defendants-appellants include the States of Utah and Colorado, also several water conservation districts, and electrical power associations.

The plaintiffs, defendants, and intervenors all moved for summary judgment. Numerous affidavits were filed with attached tables, reports, maps, photographs, and other material; there was also filed a stipulation of facts. One witness testified as to the unsightly appearance which would result if water from the reservoir entered the Monument.

The trial court entered a judgment and decree granting plaintiffs' motion for summary judgment. This decree ordered the defendant officials to take action to have the water from Lake Powell withdrawn from within the boundaries of Rainbow Bridge National Monument, and to prevent in the future such encroachment.

The defendants and intervening defendants have taken this appeal. The decree of the District Court was stayed pending an expedited hearing of this court sitting en banc on the appeal of the case on its merits.

This case reaches us on the issue of whether or not the trial court was correct in holding that certain provisions of the Colorado River Storage Project Act of 1956 (43 U.S.C. § 620), and especially sections 1 and 3 thereof prohibit any water from Lake Powell entering any part of the Rainbow Bridge National Monument.

The record shows that the water enters the Monument when the water level in Lake Powell reaches 3,606 feet above mean sea level. The plaintiffs did not assert a claim based upon the possibility of physical damage to the Rainbow Bridge itself, but relied upon the statutory provisions in the Colorado River Storage Project Act.

We must conclude that the trial court was in error, and the case must be reversed.

Rainbow Bridge National Monument:

This Monument was created by Presidential Proclamation in 1910, and is a square tract of 160 acres in the southernmost portion of Utah between the Colorado River Canyon and the Arizona state line. The Monument has been visited by few people in past years because of its isolated location. It is a very important Monument and contains a unique work of nature. Rainbow Bridge itself is an impressive natural sandstone arch of great size extending across the inner gorge or cut of Bridge Creek within a larger canyon. Within and under the span, the inner gorge of Bridge Creek is seventy to seventy-five feet deep and extends below the lower base or abutment of the arch. It has steep, rocky, shelving, sandstone sides. Bridge Creek is an intermittent stream which flows into Lake Powell, the reservoir created by Glen Canyon Dam. This reservoir is still in the process of filling, and thus the maximum water level has not been reached. The annual high water mark has varied from year to year depending on the runoff in the Colorado River Basin. The level also varies month by month, and will continue to do so, by reason of release of water from the reservoir for a variety of purposes.

As the level of Lake Powell rises, the water, of course,

backs up the side canyons including that of Bridge Creek. When the water level in the Lake reaches 3,606 feet above mean sea level, the reservoir water has moved up the bed of Bridge Creek to a point at the outer boundary of the 160-acre tract of land comprising Rainbow Bridge National Monument. At any higher level the water enters the Monument within the creek bed at the bottom of the deep Bridge Canyon. When the water level of Lake Powell reaches the level of 3,700 feet above sea level, which is the maximum design capacity for Glen Canyon Dam, the reservoir water will be standing in the inner gorge of the creek under the Rainbow Bridge Arch. At this level the water will there have a depth of about forty-eight feet, but will not rise enough to get out of the gorge or to reach the base of the Rainbow Bridge Arch since this point is some twenty-five feet above that level. The water, however, would then be well within the boundaries of the Monument although confined in the inner gorge of the creek.

As indicated, the water level is subject to frequent and wide variations. This results in an unsightly deposition of sediments and debris, as well as a conspicious staining of the rocks at the various water levels all through the reservoir area.

The waters from Lake Powell first entered the outer boundaries of the Monument in May 1971, and withdrew as the Lake level dropped but again entered one or more times.

Glen Canyon Dam:

This Dam is on the Colorado River near the Arizona-Utah boundary and was built in the period 1957 to 1964. The Dam has a maximum design capacity at 3,700 feet above sea level. There are two large spillways, each with gates, and designed to handle a flow of 276,000 cubic feet per second. Water may be also discharged from the Lake into the power generating plants at a rate of 25,000 cubic feet per second when there is a full demand for power. The centers of the intakes to the power plant are at 3,470 feet above sea level. There are additional outlet works or bypasses whereby water may be released through the Dam at 3,374

feet elevation at a maximum rate of 15,000 cubic feet per second. The maximum capacity of the outlet works below the level of the spillways is thus 40,000 cubic feet per second. This is a factor which is significant, and will be referred to later herein.

With a water level of 3,700 feet, the total storage capacity of the Lake is estimated at 27,000,000 acre feet. At the level of 3,606 feet as ordered by the trial court, the total storage capacity is about 12,751,000 acre feet.

The power facilities at the Dam are designed to generate a large amount of electricity to provide additional power to the Southwest, and to the Pacific Coast. This power generation was considered by Congress at length in the hearings conducted on the proposed construction of the Dam, both as to the availability of the additional power, and the revenue to be derived from its sale. The planned quantity of electricity which was to be generated and the revenues therefrom were predicated upon the Dam being utilized to its maximum design capacity, and this would also provide a firm source on an annual basis.

Colorado River Waters:

The division or allocation of the waters of the Colorado River was commenced by the Colorado River Compact signed in 1922 by representatives of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, subject to approval by the various state legislatures and by Congress. This Compact, which has the status of a treaty, is described in Arizona v. California, 373 U.S. 546, and is set out at 70 Cong. Record 324 (1928). This agreement divided the entire river basin in two parts, the Lower Basin and the Upper Basin, with the dividing point at Lees Ferry, Arizona, which is a short distance below Glen Canyon Dam. The water was apportioned 7,500,000 acre feet per annum to each Basin with recognition given to a portion to be released to Mexico. The Compact further provided that the Upper Basin states will not cause the flow of the river at Lees Ferry to be depleted below an aggregate of 75,000,000 acre feet for any ten years period. As is indicated, the division

of the water was made on the assumption that there would be available annually a total of 15,000,000 acre feet and the Upper Basin obligation to deliver at Lees Ferry was so undertaken. Stream flow since the date the Compact was negotiated has been considerably less than the assumed amount.

In 1948 the Upper Basin states entered into another compact, this time to divide the Upper Basin water, again subject to approval by the legislatures and by Congress. This division was accomplished by allocating a percentage of available water to each state with one exception.

The Statutes:

With the basic division of the Colorado River water agreed upon, the planned development of the Colorado River Basin proceeded. In 1956 Congress passed the comprehensive Colorado River Storage Act (43 U.S.C. § 620); Public Law 485, 84th Cong. 2d Sess.). This Act recited that it was to accomplish a comprehensive development of the Colorado River, regulating its flow and storing water, making it possible for the states of the Upper Basin to utilize, consistently with the provisions of the Colorado River Compact, the apportionments made to and among them in the Colorado River Compact and Upper Colorado River Basin Compact. The Act authorized the Secretary of the Interior to construct and operate the initial units of the storage project consisting of Curecanti, Flaming Gorge, Navajo Dam, and Glen Canyon.

The Storage Act also authorized the creation of the Upper Colorado River Basin Fund. This directs that proceeds from sale of power and other revenues from Upper Basin facilities be available for the Upper Basin Fund. This Fund is to meet maintenance, operating, and replacement costs of the Colorado River Storage Project and of many participating projects. The Fund is also to be used to repay power and municipal costs incurred by the Government including interest. If there is a surplus the money goes to the Upper Basin states for repayment of project costs.

As part of the Storage Act, Congress included the two following provisions which are in issue here. The record shows this was done in response to the objections made by some conservation groups. Thus Congress in the Storage Act (43 U.S.C. § 620) included a proviso in section 1:

> "That as part of the Glen Canyon Unit the Secretary of the Interior shall take adequate protective measures to preclude impairment of the Rainbow Bridge National Monument."

There was also included in section 3 the following:

> "It is the intention of Congress that no dam or reservoir constructed under the authorization of this Act shall be within any national park or monument."

During the course of construction of Glen Canyon Dam, other dams or projects were authorized under the Storage Act. These include the Navajo Project, P.L. 87-483, in June 1962; the Fryingpan-Arkansas Project, P.L. 87-590, in August 1962; Savery-PotHook, Bostwick Park, Fruitland Mesa Projects, P.L. 88-568, in September 1964. As construction of Glen Canyon Project proceeded, Congress passed annually the appropriation acts for construction of Glen Canyon Dam itself. These will be hereinafter considered, and are of great significance to the issues raised.

In 1968 Congress passed the Colorado River Basin Project Act (43 U.S.C. § 1501). This was to further carry out the Colorado River water development. This Act is significant here because it was considered after Glen Canyon Dam was completed. In the Colorado River Basin Project Act at 43 U.S.C. § 1521(a), provision having been made for construction of the Central Arizona Project in the Lower Basin, it was provided that the full capacity of the aqueduct supplying water to this project could not be used unless Lake Powell was full or releases are made from Lake Powell to prevent the reservoir from exceeding the elevation of 3,700 feet or when water is released pursuant to

other provisions of the Act. The Act elsewhere directs that the projects be operated to maintain as nearly as practicable active storage in Lake Mead equal to active storage in Lake Powell. This attempted equality, and the limitation on capacity of the aqueduct, is again based on the operation of Lake Powell to maximum capacity. The Act also authorized the Animas-La Plata, Dolores, Dallas Creek, and San Miguel Projects in the Upper Basin at the same time.

The provisions of the Project Act of 1968 (43 U.S.C § 1501) are important in that they directed the Secretary of the Interior to adopt a specific plan for the operation of the reservoirs built pursuant to the 1956 Storage Act. These operating criteria were to insure that the provisions of both the Colorado River Compact and the Upper Basin Compact were carried out; and further, that the treaty deliveries to Mexico were given the proper priority. These criteria were adopted and reported to Congress.

The method of operation of the reservoirs was of great importance to the Upper Basin states to permit them to use the river regulating reservoirs to store water at the proper time and place to enable them to meet their obligation to the Lower Basin states. This storage, if sufficient, would then permit the Upper Basin states to utilize the water allocated under their Compacts, and to use the revenues to develop participating projects for irrigation. These river regulating reservoirs include Curecanti, Flaming Gorge, Navajo, and Glen Canyon. Of these, Lake Powell has some 25,000,000 acre feet of active storage if operated to capacity, while the others combined have a total of about 6,400,000 acre feet.

From the above description of the legislation, it is apparent that Lake Powell is an important element or link in the Colorado River water and power development. It cannot be considered alone as all the existing projects in the Upper Basin, and the planned ones, are interrelated and interdependent. The projects have different purposes and functions, but are dependent on Lake Powell to provide basic storage necessary to fulfill the delivery requirements

to the downstream states and Mexico, especially in dry years. If these requirements can be so met by use of this storage, the upper states can develop the water allocated to them for irrigation and other projects. If this storage is reduced by a limitation on the level of Lake Powell, some projects built, and some authorized, are at least impaired. This interrelation created by the comprehensive plan for development is rather delicate and can be disturbed if the capacity of by far the largest storage or regulating unit is reduced significantly. The total development plan was given extensive consideration by water experts and by Congress. See 84 Cong. 1st Sess. (1955), S. Report 128, and 84th Cong. 2d Sess. (1956), House Report 1087. The repayment schedules and power revenues were also fully integrated into the plan. See 2 U.S. Cong. News, 84th Cong. 2d Sess. (1956) 2352-59. This in turn all relates to the above two quoted sections inserted in the Storage Act and about which the issues revolve.

Action by Congress Following The Storage Act:

The provisions contained in the Colorado River Storage Act (43 U.S.C. § 620) quoted above which direct the Secretary to take protective measures as to Rainbow Bridge National Monument could not be a more specific reference. It is clearly and solely directed to the extension of Lake Powell water into the Monument. This had been considered at great length during extensive hearings, and was an issue to which the several conservation groups had directed the attention of the members of Congress by a long and vigorous campaign. See House Report No. 1087, 84th Cong. 2d Sess. (1956). There were at the time of enactment of the Storage Act no specific plans or cost estimates as to these protective works or measures referred to in section 1. With the inclusion of this provision, with additions to section 3, and with the elimination of the Echo Park Project, the conservation groups, or some of them, apparently withdrew their objections to the Act.

As quoted above, Congress inserted in the Storage Act,

in section 3 thereof, the language upon which the plaintiffs place great reliance. It reads:

> "It is the intention of Congress that no dam or reservoir constructed under the authorization of this Act shall be within any national park or monument."

This reference is general and all-inclusive as contrasted to the section 1 reference to Rainbow Bridge National Monument. This is a clear and direct expression of the intent of Congress, but is made in the absence of any direct prohibition or affirmative directive. This is again in contrast with section 1; however, we do not consider this factor to be of particular significance, and will assume the section 3 language to be a direct prohibition directed to the appropriate officials.

These two provisions were inserted in the context of plans for the Glen Canyon Dam which included a designed maximum water level of 3,700 feet above sea level. This is apparently the reason for the specific directive in section 1 to the Secretary to take protective measures as to Rainbow Bridge National Monument. It was apparent, and it was discussed, that water would be in the Monument at the designed level. Thus it was obvious from the start that water would be backed up into the Monument if nothing further were done. Of course, the record shows that nothing further was done, and the water has so entered the outer boundaries of the Monument.

As indicated above, there were no firm plans or cost estimates for protective works as there were for all the other aspects of the Glen Canyon Project, when Congress enacted the Storage Act in 1956. Construction began soon after and continued into 1964.

The action taken by Congress after passage of the Storage Act demonstrates a repeal of sections 1 and 3 thereof. The record shows that in 1960, in reference to the 1961 Public Works Appropriation Bill, House Report No. 1634

(86th Cong. 2d Sess.), the budget estimate for Glen Canyon Unit was reduced by $3,500,000. The House Committee Report stated in part:

> "Glen Canyon Unit -- An appropriation of $23,535,000 is recommended, a reduction of $3,500,000 in the budget estimate of $27,035,000 This action deletes the funds programmed for protection of the Rainbow Bridge National Monument. It has been estimated that the total cost of protecting this Bridge would be in a vicinity of $20,000,000. Access to this national monument will not be affected by the construction of Glen Canyon dam and reservoir, in fact it will be improved to some extent. *The geological examination report on the problem indicates clearly that there will be no structural damage to Rainbow Bridge by the reservoir waters beneath it.* The Committee sees no purpose in undertaking an additional expenditure in the vicinity of $20,000,000, in order to build the complicated structures necessary to provide the protection contemplated." (Emphasis added).

The $3,500,000 was the request by the Commissioner to begin the protective works for the Monument.

The Senate Committee, on the same Appropriation Act, reached the same conclusion (S.Report No. 1763, 86th Cong. 2d Sess.), and reported in part:

> "The recommendation of the committee is in accord with the House action of disallowing all funds requested for the initiation of construction of facilities to protect the Rainbow Bridge National Monument."

And added:

> "In taking this action the committee has considered the findings of the Geological Survey that the impoundment of water in Glen Canyon Reser-

> voir [Lake Powell] will not result in any structural damage to the Rainbow Bridge."

The deletion of funds by Congress for protective works was fully considered at committee hearings on the 1961 Appropriation Act. It may be noted that Glen Canyon Dam was then several years from completion.

The matter was again considered during the hearings and in the reports for the 1962 Public Works Appropriation Act (see 87th Cong. 1st Sess., House Report No. 1125, and Senate Report No. 1097). Requested funds for protective works were again disallowed. The Senate Report No. 1097 explained why -- that no damage would result and the costs were too great.

In the 1962 Appropriation Act, this proviso was inserted:

> "Provided, That no part of the funds herein appropriated shall be available for construction or operation of facilities to prevent waters of Lake Powell from entering any National Monument."

Thus the funds specifically requested for protective works by the Commissioner were again disallowed, and of greater significance, the express prohibition as to use of funds was thus added. At hearings again the matter was fully considered.

In 1963 the Secretaray of the Interior raised the issue of protective works for Rainbow Bridge before Congress although no formal budget request had been made for them. Reference in the hearings were made as to the changes in the law, and the Secretary was advised that protective works would not be considered. See 87th Cong. 2d Ses House Subcommittee Hearings on Appropriations, Public Works Appropriations, 1963, Part 3. Also see the Senate Hearings on Public Works Appropriations for 1963.

In the years after 1963 the Secretary did not make further formal requests for funds for protective works. How-

ever, all subsequent Appropriation Acts for public works to 1973 carry the same prohibition quoted above. Thus the proviso appeared in some twelve separate Acts, and was considered and enacted during virtually all stages of construction of Glen Canyon Dam and thereafter.

The Appropriation Act for 1972, referred to above, for the Upper Colorado River Storage Project (P.L. 92-134), was considered during the latter part of 1971 and in 1972. This Act contained the same proviso that funds be not used for protective works, and it is of interest that water from Lake Powell was within the boundaries of Rainbow Bridge National Monument continuously from May 15, 1971, to September 15, 1972, and from October 20, 1972, to January 1, 1973.

The record thus demonstrates affirmatively that Congress evaluated the consequences of water encroachment into Rainbow Bridge National Monument, and the difficulty, unsightliness of the protective dam, pumps, and tunnel, and the costs, and made a choice. The resultant specific prohibition as to the use of funds for protective works in the face of the inevitable water advance in the streambed under the Bridge has overridden the expression of intent in section 3 of the Storage Act as to Rainbow Bridge, and has overridden the specific reference to Rainbow Bridge in section 1 thereof. This indicates that Congress reached the decision not to modify the planned operation of the Glen Canyon Dam nor to authorize protective works to be built.

Congress, as we have seen, has also proceeded with the construction of other and related projects within the plan and provisions of the 1956 Storage Act. Several of these are completed and in operation including Navajo Lake, Curecanti, Flaming Gorge, and Fontenelle Reservoir. Thus the 1956 Storage Act and the Colorado River Basin Project Act are both currently being carried out as planned. There are many additional participating projects within the same plan which are being constructed or authorized by Congress. These are all dependent upon the design and operation of all the basic facilities, especially Lake Powell, at maximum

capacity. This is a further indication of the position of Congress as to the operation of the Lake at capacity.

Considering the legislation passed by Congress with reference directly to Lake Powell and which also was predicated upon its use to capacity, together with committee reports directed specifically to the matters here concerned, there is a firm directive by Congress as to Rainbow Bridge National Monument specifically and as to Lake Powell. We have affirmative statements of position by Congress as to the two sections of the Storage Act in issue. This is all in the larger context of prior expressions of the concern of Congress for National Parks and Monuments, and the long series of legislative acts relative to such an important and urgent subject. The position of Congress as to such subjects has thus been made clear, and there resulted somewhat of a collision between such concern and the other important and urgent subject of the implementation of the Colorado River Compacts. This was resolved by Congress, not without some pain and suffering, as described above.

The Authorities:

The basic statutory provisions in the Storage Act (43 U.S.C. § 620) with which we are concerned were inserted, as described above, in sections 1 and 3 of the comprehensive statute for the Colorado River Development. These provisions have there remained, but Congress has made them a nullity by the contrary provisions in the many appropriation acts which are supported by its declared reasons set forth in the formal committee reports.

Appropriation acts are just as effective a way to legislate as are ordinary bills relating to a particular subject. An appropriation act may be used to suspend or to modify prior Acts of Congress. In the case before us, there is both the denial of budget requests for the protective works, and also there is the direct prohibition against the use of money for such purposes. In addition, the committee reports describe the considerations examined and evaluated by Congress and the reasons for the action taken. This is thus

not really a situation of repeal by implication as in Posadas v. National City Bank, 296 U.S. 497, but more a reversal of a previous position after considering it fully in the public hearings and after the members apparently came to the conclusion that the protective works would be more detrimental than the presence of water in the Monument. The committee reports indicate it was concluded there would by no physical damage to the Rainbow Bridge itself. This "repeal," if it should be called that, thus was straightforward, direct, and after hearings on the subject.

The Supreme Court, in United States v. Dickerson, 310 U.S. 554, considered a proviso in an appropriation act that the funds in that or any other appropriation acts could not be used to pay reenlistment allowances. There was a specific statute providing for such allowances. The Court said:

> "There can be no doubt that Congress could suspend or repeal the authorization contained in § 9, and it could accomplish its purpose by an amendment to an appropriation bill, or otherwise."

The Court then cited United States v. Mitchell, 109 U.S. 146; Mathews v. United States, 123 U.S. 182; and United States v. Vulte, 233 U.S. 509. The Court found the intention clear in Dickerson to suspend the allowance in the face of the statute authorizing it. In the above three cited cases, the Court was concerned with appropriation acts which related to the amount authorized to be paid to officials whose salary was fixed by a prior statute. The Court in Dickerson also referred to United States v. Langston, 118 U.S. 389, which was an action to recover an unpaid balance of salary. The statute in Langston provided payment of $7,500 per year without any limitation in time, but subsequent appropriation acts provided for $5,000. The Court held the statute was not repealed by the appropriation acts, and said that it was not probable that Congress "should" at a subsequent date ". . . make a permanent reduction of his salary without indicating its purpose to do so, either by express words of repeal, or by such provisions as would compel the courts

to say that harmony between the old and the new statute was impossible." However, in the case before us the above description of the explanations in the committee reports, and in the legislation itself compel us to say that the provisions in the Storage Act were repealed. The facts in this case present more and stronger reasons for reaching the same result as reached in United States v. Dickerson, 310 U.S. 554.

This case at issue here is significant, and different, however, from the cited cases, in that it does not involve a money provision in both statutes. Instead there is a reference to, and consideration of, what action should be taken with reference to the National Monument in which Congress had expressed concern, and the subsequent money legislation which could or could not have resolved the initial concern. The record shows that Congress evaluated the issues and reached a decision. This is sufficiently well documented in committee reports and otherwise to dictate the conclusion here reached. As the Court said in Dickerson:

> "The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction."

In addition to the Appropriation Acts, we have considered the other Acts of Congress, described above, which concerned other dams and projects within the scope of the Storage Act in reaching our conclusions.

We are urged in the briefs to also consider the doctrine of construction by statutes by administrative interpretation or practice as in Udall v. Tallman, 380 U.S. 1, but we do not consider this to be necessary. We have, however, considered United States v. Borden Co., 308 U.S. 188, on the matter of inconsistent statutes. There is little decisional authority on the issues but United States v. Dickerson, 310 U.S. 554, is applicable and directly rules on the effectiveness of appropriation acts.

The plaintiffs argue that the Dam and the Lake should be operated by the Bureau of Reclamation at a reduced

level, and the Lake not be filled at any time above the 3,606 foot level. This is basically what the trial court directed. This argument, and the remedy sought, is directed to the executive branch and assumes that the above quoted provisions of the Storage Act be taken by such officials as originally enacted and without regard to what Congress may have since done.

Under such a position, the facilities at Glen Canyon, as related to others in the overall system, would be used to about one-half the design capacity. This in our opinion is contrary to the intention and to the directives of Congress. We have indicated above that the entire development was a balanced system or plan, considered as such by Congress, and so approved. To so radically change the effectiveness of the principal regulating reservoir is to prevent the attainment of the objectives of the Colorado River Compacts, and to prevent the fulfillment of the objctives of the Colorado River Storage Act and the Colorado River Basin Project Act.

The data in the record shows that at a level of 3,700 feet above sea level the *total* storage is about 27,000,000 acre feet and with an *active* capacity somewhat less. With the water level at 3,606 feet, the *total* storage *is* 14,749,000 acre feet with active storage again at a lesser figure. The affidavits in the record show that this large reduction in storage will substantially reduce the amount of water available to each of the Upper Basin states, and will impair the operation of many facilities already constructed and perhaps prevent use of some entirely. It will also make many more in the planning stage impracticable. This results not only from the lack of water storage to meet downriver obligations, but also from the resulting decline in power revenues.

With an attempted operation of Lake Powell with a maximum level at 3,606 feet, the initial problem arises, of course, from the fact that the Dam was not designed for such a limit. If the water cannot rise above 3,606 feet, the spillways cannot be used to accommodate the anticipated inflows of water into the Lake. The only way to handle such

inflows is to use the power plant penstocks and outlet works passing water through the Dam as described above. The combined capacity of both these facilities is not sufficient to handle the expected wet year inflows nor even the normal year inflows. Thus to accommodate this additional water when operating with a 3,606 foot limit, the Lake level would have to be lowered in advance well below the 3,606 foot level. The record shows this lowering for a normal year should be to at least 3,589 feet and to 3,530 feet for a wet year. This would further reduce the storage by 1,000,000 acre feet and five and one-half acre feet. This reduction in level also reduces the head or pressure available for power with a resultant drop in the amount of electricity which can be generated, and causes doubt as to it as an annual firm source. This reduces the money available to the Upper Basin Fund for repayments and for operation of facilities as planned by Congress.

It is obvious that when Glen Canyon Dam is used to its full design capacity, the water level will be dropped at times below the 3,700 foot level by the required releases of water and by variations in the amount of runoff but the spillways can be used. These declines will also reduce the power head, but this has been included in the planned power sales and the repayment schedules in the initial planning approved by Congress.

The Project Act (43 U.S.C. § 1552(a)) required the formulation of operating criteria by the Bureau of Reclamation for the operation of Glen Canyon Dam and Hoover Dam to include the relationship of the two. This was also to insure that the terms of the Colorado River Compacts would be carried out. These criteria have been adopted, published, and reported to Congress. They set forth a plan of operation which is based on the full utilization of the capacity of Glen Canyon Dam. They further contain provision for approximate equalization of storage in the two Lakes, and again this can only be done when the total design capacity of Glen Canyon is used. This again we must assume was considered by Congress as the directed operating method.

In conclusion on the argument that Glen Canyon Dam should be operated at less than capacity, we again refer to the portion of this opinion which considers the elimination by Congress of provision for protective works for Rainbow Bridge, and to the termination by Congress, as to Rainbow Bridge, of the application of the general wording in section 3 of the Storage Act. This left the project as planned at the time Congress approved it, and this was to the full extent of its design capacity as now constructed in all respects. The officials of the Bureau of Reclamation who are charged with the operation of Glen Canyon Dam and Lake Mead have so operated the Dams, and this is correct. There was included a specific admonition by Congress to them that the power generation facilities be operated at their most productive rate (43 U.S.C. § 620f).

The duties of the officials of the Bureau to follow the indications given by Congress in the Appropriation Acts, and otherwise, were referred to by the court in National Parks Ass'n v. Udall, No. 3904-62 (U.S.C.), District of Columbia), and by the Solicitor of the Department of the Interior in his opinion at 70 I.D. 200, March 18, 1973.

We have considered the line of cases which are cited in and which include Dugan v. Rank, 372 U.S. 609, on the problem of sovereign immunity. This was with particular reference to the exceptions described in Malone v. Bowdoin, 369 U.S. 643. In our opinion this case is very similar to Dugan v. Rank wherein the Court concluded that the action there filed against officials of the Bureau of Reclamation was an action against the sovereign because it interfered with "the public administration." Land v. Dollar, 330 U.S. 731. In Dugan v. Rank, the Court found that the action of the Reclamation officials was within their statutory powers of condemnation.

Here, as we have above described, the actions of the defendant officials in the operation of Glen Canyon Dam at capacity is within the statutes as amended by Congress. Thus upon this determination, this action does fall within Dugan v. Rank.

The defendant officials have made computations presumably based upon levels previously surveyed. These were used in the evidence they presented to the trial court and to this court. These figures were not challenged by the plaintiffs, and have been used in opinion. These same calculations also served as a basis for the many actions taken by Congress described above. Particularly the representation has been made that when the Dam is operated at maximum design capacity, the water depth under Rainbow Bridge, within the sides of Bridge Creek gorge, will not exceed forty-eight feet. It was on this figure also that the determinations were made by the Geological Survey and Congress that there would be no structural damage to the Arch. In view of the remote possibility that the surveys may not be entirely accurate or for any other reason the depth of water might there significantly exceed that figure, or in the event that some unexpected indication of structural damage to the Arch might become evident, it is directed that the trial court retain jurisdiction of this action for ten years after the date of the mandate herein. This retention of jurisdiction will permit the plaintiffs to seek further relief within that time if either of the indicated events occurs. For these purposes, the depth of the water under the Arch will be considered to have "significantly exceeded" the computed figure of forty-eight feet only if it reaches or exceeds an average depth of fifty-five feet measured along the thread of Bridge Creek for the width of the Arch and under the Arch.

Thus, it is ordered that the judgment of the trial court is vacated and set aside, and the case is REMANDED with directions that jurisdiction be retained as above provided.

DOYLE, Circuit Judge concurring:

I concur fully in the statements and conclusions of Judge Seth in the majority opinion and would add this very brief personal supplement to it.

The element which argues most strongly in favor of Judge Seth's opinion is the fact that the dam and reservoir which are a part of an interrelated system of dams and

reservoirs along the Colorado go back many years. They commenced with the Colorado River Compact in 1923. During the entire period Congress has been aware of the problems. Since construction started in 1953, the problem of water encroachment or invasion of the Rainbow Bridge Monument area has been specifically considered and Congress has repeatedly refused to take protective measures. This was with full knowledge that use of the dam would necessarily result in encroachment of the water.

The full use of the dam to the level of 3700 feet is essential to the generating of electricity and to the full beneficial use of the water by the upper basin states.

How then in the face of this evidence could Congress have intended that the Monument area be free of water when to give such an interpretation renders the dam and reservoir system of limited use?

It is to be emphasized that Rainbow Bridge is not in peril, and we will cross that bridge if and when that problem arises. Plaintiffs do not contend that the Bridge will even get wet. Their objection is to the presence of water in Bridge Creek which is in the gorge in the center of the Monument area—far from the Bridge. We are not unsympathic to their concern because the water makes the area more accessible and interferes with full aesthetic enjoyment of the Monument area. That fact does not, of course, empower us to grant the relief. We must follow the law.

McWILLIAMS, Circuit Judge, concurring in part and dissenting in part:

I fully concur in the body of Judge Seth's opinion and respectfully dissent only as to the form of the remand. For all of the reasons so cogently set forth in the majority opinion, I would reverse the judgment of the trial court and remand the case to that court with directions to enter judgment for the defendants. Accordingly, I dissent from the majority remand which directs the trial court to retain jurisdiction of the case for ten years and during that period of time to permit the plaintiffs to seek further relief if fu-

ture events would justify such. If future events warrant future litigation, it should be done in a new and different proceeding, in my view, and I would terminate the present controversy at this time.

LEWIS, Chief Judge, with whom HILL, Circuit Judge, joins, dissenting:

This case brings to the court the necessity of considering several aspects of the continuing controversy between two ideologies, each desirable when viewed in isolation but necessarily clashing in practical application. In particular, the subject matter of the case involves whether the national welfare is best served by maximum conservation and industrial utility of the waters of the Colorado River or whether the national interest requires a modified use so as to protect the natural environment of the area designated as the Rainbow Bridge National Monument. So stated, the issue is a classic one for congressional consideration and not for judicial determination. And since I firmly believe that the posture of the case itself does not bring the controversy within the orbit of judicial concern, I must dissent. A majority of the court is, however, in agreement that Congress has already performed its full function and has clearly indicated that the present national interest requires maximum potential industrial use of the water of Lake Powell as contained back of the Glen Canyon Dam. To reach this result the majority must and does hold that sections 1 and 3 of the Colorado River Storage Act of 1956 (43 U.S.C. § 620, Public Law 485, 84 Cong. 2d Sess.) have been repealed by implication or so modified as to be impotent under the express wording of the statutes as they still exist in the law. But however viewed I consider the action of the majority to be a deep trespass upon the prerogatives of Congress and a clear and dangerous violation of the doctrine of separation of powers.

Section 1 of the cited Act provides:

> That as part of the Glen Canyon Unit the Secretary of the Interior shall take adequate protective

measures to preclude impairment of the Rainbow Bridge National Monument.

This section makes specific reference to the Rainbow Bridge National Monument but, as the main opinion recognizes, is completely severable in context from section 3, later discussed. However the majority places considerable emphasis upon the repeated refusal of Congress to provide funds for the Secretary of the Interior to implement section 1 as a supporting argument that section 3 has been repealed by implication. I do not agree. Congress authorizes many projects which die aborning from lack of funding or are not immediately implemented by funding. It is not for the courts to deny the validity of the statutory authorization simply from lack of funding. And that is particularly true in the case at bar. As pointed out in the main opinion, funding under section 1 has been specifically negated as to Rainbow Bridge Monument, to me a clear expression of Congress' recognition that section 1 is viable. The majority appears to recognize this in part and would seem to take some of the language contained in the appropriation acts as authority for holding that it is the present intent of Congress to protect only Rainbow Bridge and not the surrounding Monument area. In any event the decision breathes new life into protecting the Bridge proper and designates an allowable depth under the Bridge of fifty-five feet of water as the maximum to be tolerated, retaining jurisdiction for ten years apparently as guardian of the Bridge proper. Perhaps current events have persuaded the majority to impose this restriction. This year's run-off is extremely high and is now in progress. The capacity of Lake Powell has been or soon will be attained through the Glen Canyon Dam reaching its holding capacity. Water is now beneath the Bridge and is expected to reach a depth of forty-eight feet as estimated and the unexpected may occur. The protective order of the main opinion is understandable to me. But such extraordinary judicial action is without precedent and invades the legislative and administrative fields of authority. It is not for this court to say that the Bridge proper is to be protected from the waters of Lake Powell but that the Rain-

bow Bridge National Monument should not be so protected. Nor should this court volunteer to police the control of Lake Powell waters for a period of ten years or any other period for any purpose whatsoever, absent the necessity of using the injunctive power to enforce an act of Congress and then only under the most extraordinary circumstances. And I consider my views in this regard to be not only applicable to section 1 of the Act but also clearly applicable to section 3. 43 U.S.C. § 620b provides in pertinent part:

> It is the intention of Congress that no dam or reservoir constructed under the authorization of this chapter shall be within any national park or monument.

This mandate from Congress is not limited in any way to the problem at Rainbow Bridge. The statute is not ambiguous and, indeed, it is seldom that Congress deems it necessary to so specifically spell out its intention. The legislative history[1]/ of the Colorado Storage Act indicates that the inclusion of section 3 was necessary to assure its enact-

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[1] The great bulk of the evidence in this case, and the briefs of all the parties, is and are primarily directed to the damage and waste that can be anticipated from either result reached in this decision. There can be no doubt that great economic benefits lie in the maximum use of the water of Lake Powell to create hydroelectric power and for other beneficial uses particularly applicable to the Four Corner States. So, too, the flooding of Rainbow Bridge Monument will inevitably result in environmental damage the extent of which is dependent upon the amount and duration of the flooding. This damage is claimed to result to all the people of the nation because of the dedication of the Monument and is thus not localized to the interests of particular states. For an elaborate discussion of the value of Rainbow Bridge to posterity reference can be made to the opinion of the trial court. The issue is patently one for congressional consideration and, under my view, need not be discussed.

So, too, the parties have comprehensively briefed the legislative history of the subject Act and all subsequent legislation. The main opinion treats this approach to the case in a conclusionary manner and I do not think it is necessary to elaborate in this regard. It is sufficient to say that I completely disagree that section 3 has been repealed by implication.

ment. Congressman Aspinall, (Colo.), then a leading proponent of the Storage Act, in reporting the amended project bill, said "And may I here and now advise the committee that the sponsors of the legislation promise and agree with the Members of the House that they shall keep their agreement with the conservationists of the Nation in this particular."[2] Mr. Aspinall commented further on this "agreement" as follows:

> . . . We have entered into an agreement with the conservationists to the effect that we would not trespass upon any national park or national monument area in the construction of projects authorized under the provisions of this bill. I mention this because of a colloquy relative to the position of the Sierra Club. Since that time, I have talked to Mr. Brower, the Director of the Club, and he has assured me within the last 20 minutes that their opposition is withdrawn provided we place and keep within this bill the provisions that we will not trespass upon the national park or national monument areas.[3]

Ultimately the Conference Report of the two Houses stated:

> The matter of retaining intact our national park system was an important issue in the consideration by Congress of this legislation. The House approved bill—(1) deleting the Echo Park Storage unit, (2) requiring "protective measures to preclude impairment of the Rainbow Bridge National Monument" and (3) expressing the "intention of Congress that no dam or reservoir constructed under the authorization of this act shall be within any national park or monument, ". . . makes clear the intention of the House that there be no in-

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[2] 102 Cong. Rec. 3510 (1956).

[3] 102 Cong. Rec. 3504 (1956).

vasion or impairment of the national park system by the works authorized to be constructed under this legislation. The conference committee upheld the House position and adopted the House-approved language.[4]/

We start then with an original congressional mandate, not expressly repealed by any subsequent Congress, that *no* reservoir shall be within *any* national monument and the undisputed fact that the Rainbow Bridge National Monument is now flooded even under the Bridge and with the judicial sanction of repeal by implication. To me, the judicial words "repealed by implication", by very definition, carry heavy overtones of erosion into the doctrine of separation of powers. So, too, the chosen words contained in the main opinion "reversal of a previous position" describe an equally dangerous judicial aggression.

Congress has not failed to amend or repeal the subject legislation through inadvertence. Eight different bills have been presented to the United States Congress during the past thirteen years in an attempt to amend the limiting language found in sections 1 and 3 of the Act.[5]/ Senator Moss has introduced six bills, all identical in nature, to amend section 3 by deleting "[i]t is the intention of Congress that no dam or reservoir constructed under the authorization of the Act shall be within any national park or monument." Senator Bennett and Representative McKay of Utah have each introduced a bill attempting to repeal the limiting language found in the Act. None of these bills has been reported out of committe, evidencing a lack of broad-based support for their passage in the Congress.

Furthermore, the very fact that these Congressmen felt it necessary to introduce amending legislation indicates,

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[4] 102 Cong. Rec. 5768 (1956).

[5] Senator Moss has introduced: S. 3180 (1960), S. 175 (1961), S. 333 (1963), S. 1555 (1967), S. 307 (1969), S. 1057 (still pending before the Senate). Senator Bennett introduced S. 1188 in 1961 and Congressman McKay has introduced H. R. 6255 which is now pending before the House.

at least on their part, no assurance that Congress has in any manner repealed the sections in question. Quite to the contrary, remarks of both Senator Bennett and Senator Moss contained in the Congressional Record manifest a belief that direct repeal is necessary."/

In Georgia v. Pennsylvania R.R., 324 U.S. 439, the Supreme Court was presented with the question of whether the Sherman Act was impliedly repealed with respect to those carriers under the jurisdiction of the I.C.C. by the Interstate Commerce Act. The Court, in rejecting the implied repeal argument, noted that one factor in its decision was the fact that there had been congressional proposals to confer immunity on interstate carriers from the anti-trust laws, but these proposals had not been adopted. The Court stated: "Twice Congress has been tendered proposals to legalize rate-fixing combinations. But it has not adopted them. In view of this history we can only conclude that they have no immunity from the anti-trust laws." The same types of explicit, unsuccessful attempts to legislatively repeal section 3 of the Colorado River Storage Project Act are present in this case.

The Supreme Court has consistently stated that judicial interpretation is disfavored as a means of establishing a repeal of legislation. In one case only has repeal by implication been upheld. Mathews v. U.S., 123 U.S. 182. Such implied repeal has been rejected in a multitude of cases. *See* Universal Interpretive Shuttle Corp v. Washington Metro. Area Transit Commission, 393 U.S. 186; Jones v.

/ Senator Bennett, speaking before the Senate in 1961 upon introducing S. 1188 to amend the Act, stated:

> In addition, Secretary Udall proposes that water should be permitted to back up into the monument area, feeling that this is preferable to desecrating the great wilderness area surrounding Rainbow Bridge with dams and pumps and with roads necessary to construction of the dams. This will require amendment of the Upper Colorado Act, and my bill embodies such amendments. (107 Cong. Rec. 3039 (1961).

Senator Moss has also made similar comments before the Senate. *See* 107 Cong. Rec. 193 (1961); 109 Cong. Rec. 609 (1963).

Mayer Co., 392 U.S. 409; Amell v. United States, 384 U.S. 158; United States v. Welden, 377 U.S. 95; United States v. Zacks, 375 U.S. 59; United States v. Philadelphia Nat'l Bank, 374 U.S. 321; Silver v. New York Stock Exchange, 373 U.S. 341; Mercantile Nat'l Bank at Dallas v. Langdeau, 371 U.S. 555; Bulova Watch Co. v. United States, 365 U.S. 753; Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222; Rosenberg v. United States, 346 U.S. 273; F.T.C. v. A.P.W. Paper Co., 328 U.S. 193; United States v. Borden Co., 308 U.S. 188; Posadas v. Nat'l City Bank, 296 U.S. 497; United States v. Noce, 268 U.S. 613; United States v. Greathouse, 166 U.S. 601; Wood v. United States, 16 Pet. 342. Dickerson v. Wood, 310 U.S. 554, and other cases cited in the main opinion, can give no comfort to the result reached by the majority. Any arguable impact flowing from *Dickerson* must be limited to section 1 of the Storage Act and cannot premise an implied repeal of section 3. Section 3 is self-sustaining and needs no supplement by appropriation or otherwise for its continued vitality.

In simple summation the court has done that which the Congress has many times refused to do and has, to all practical effect, enacted legislation which is actually pending before Congress for its consideration. Such judicial action is unprecedented and while the decision may be heralded by some as a good pragmatic solution to a difficult and controversial problem this is not a judicial prerogative. Current events in other unrelated fields indicate that more problems are created than solved by a softening of the basic concept of a firm and strict application of the doctrine of separation of powers.

I would affirm.

APPENDIX C

Colorado River Storage Act of 1956

Section 1, 70 *Stat.* 106, 43 *U.S.C.* § 620

In order to initiate the comprehensive development of the water resources of the Upper Colorado River Basin, for the purposes, among others, of regulating the flow of the Colorado River, storing water for beneficial consumptive use, making it possible for the States of the Upper Basin to utilize, consistently with the provisions of the Colorado River Compact, the apportionments made to and among them in the Colorado River Compact and the Upper Colorado River Basin Compact, respectively, providing for the reclamation of arid and semiarid land, for the control of floods, and for the generation of hydroelectric power, as an incident of the foregoing purposes, the Secretary of the Interior is authorized (1) to construct, operate, and maintain the following initial units of the Colorado River storage project, consisting of dams, reservoirs, powerplants, transmission facilities and appurtenant works: Curecanti, Flaming Gorge, Navajo (dam and reservoir only), and Glen Canyon: *Provided*, That the Curecanti Dam shall be constructed to a height which will impound not less than nine hundred and forty thousand acre-feet of water or will create a reservoir of such greater capacity as can be obtained by a high waterline located at seven thousand five hundred and twenty feet above mean sea level, and that construction thereof shall not be undertaken until the Secretary has, on the basis of further engineering and economic investigations, reexamined the economic justification of such unit and, accompanied by appropriate documentation in the form of a supplemental report, has certified to the Congress and to the President that, in his judgment, the benefits of such unit will exceed its costs; and (2) to construct, operate, and maintain the following additional reclamation projects (including power-generating and transmission facilities related thereto), hereinafter referred to as participating projects: Central Utah (initial phase), San Juan-Chama (initial stage), Emery

County, Florida, Hammond, La Barge, Lyman, Navajo Indian, Paonia (including the Minnesota unit, a dam and reservoir on Muddy Creek just above its confluence with the North Fork of the Gunnison River, and other necessary works), Pine River Extension, Seedskadee, Silt and Smith Fork: *Provided further*, That as part of the Glen Canyon Unit the Secretary of the Interior shall take adequate protective measures to preclude impairment of the Rainbow Bridge National Monument.

Section 3, 70 *Stat.* 107, 43 *U.S.C.* § 620 (*b*)

It is not the intention of Congress, in authorizing only those projects designated in section 620 of this title, and in authorizing priority in planning only those additional projects designated in section 620a of this title, to limit, restrict, or otherwise interfere with such comprehensive development as will provide for the consumptive use by States of the Upper Colorado River Basin of waters, the use of which is apportioned to the Upper Colorado River Basin by the Colorado River Compact and to each State thereof by the Upper Colorado River Basin Compact, nor to preclude consideration and authorization by the Congress of additional projects under the allocations in the compacts as additional needs are indicated. It is the intention of Congress that no dam or reservoir constructed under the authorization of this chapter shall be within any national park or monument.

Colorado River Basin Project Act of 1968

Section 301, 82 *Stat.* 887, 43 *U.S.C.* § 1521

(a) For the purposes of furnishing irrigation water and municipal water supplies to the water-deficient areas of Arizona and western New Mexico through direct diversion or exchange of water, control of floods, conservation and development of fish and wildlife resources, enhancement of recreation opportunities, and for other purposes, the Secretary shall construct, operate, and maintain the Central Arizona Project, consisting of the following principal works:

(1) a system of main conduits and canals, including a main canal and pumping plants (Granite Reef aqueduct and pumping plants), for diverting and carrying water from Lake Havasu to Orme Dam or suitable alternative, which system may have a capacity of 3,000 cubic feet per second or whatever lesser capacity is found to be feasible: *Provided*, That any capacity in the Granite Reef aqueduct in excess of 2,500 cubic feet per second shall be utilized for the conveyance of Colorado River water only when Lake Powell is full or releases of water are made from Lake Powell to prevent the reservoir from exceeding elevation 3,700 feet above mean sea level or when releases are made pursuant to the proviso in section 1552(a) (3) of this title: *Provided further*, That the costs of providing any capacity in excess of 2,500 cubic feet per second shall be repaid by those funds available to Arizona pursuant to the provision of section 1543(b) of this title, or by funds from sources other than the development fund; (2) Orme Dam and Reservoir and power-pumping plant or suitable alternative; (3) Buttes Dam and Reservoir, which shall be so operated as not to prejudice the rights of any user in and to the waters of the Gila River as those rights are set forth in the decree entered by the United States District Court for the District of Arizona on June 29, 1935, in United States against Gila Valley Irrigation District and others (Globe Equity Numbered 59); (4) Hooker Dam and Reservoir or suitable alternative, which shall be constructed in such a manner as to give effect to the provisions of subsection (f) of section 1524 of this title; (5) Charleston Dam and Reservoir; (6) Tucson aqueducts and pumping plants; (7) Salt-Gila aqueducts; (8) related canals, regulating facilities, hydroelectric powerplants, and electrical transmission facilities required for the operation of said principal works; (9) related water distribution and drainage works; and (10) appurtenant works.

Limitation on water diversions in years of insufficient main stream Colorado River water

(b) Article II(B) (3) of the decree of the Supreme

Court of the United States in Arizona against California (376 U.S. 340) shall be so administered that in any year in which, as determined by the Secretary, there is insufficient main stream Colorado River water available for release to satisfy annual consumptive use of seven million five hundred thousand acre-feet in Arizona, California, and Nevada, diversions from the main stream for the Central Arizona Project shall be so limited as to assure the availability of water in quantities sufficient to provide for the aggregate annual consumptive use by holders of present perfected rights, by other users in the State of California served under existing contracts with the United States by diversion works heretofore constructed, and by other existing Federal reservations in that State, of four million four hundred thousand acre-feet of mainstream water, and by users of the same character in Arizona and Nevada. Water users in the State of Nevada shall not be required to bear shortages in any proportion greater than would have been imposed in the absence of this subsection. This subsection shall not affect the relative priorities, among themselves, of water users in Arizona, Nevada, and California which are senior to diversions for the Central Arizona Project, or amend any provisions of said decree.

Augmentation of water supply of the Colorado River system

(c) The limitation stated in subsection (b) of this section shall not apply so long as the Secretary shall determine and proclaim that means are available and in operation which augment the water supply of the Colorado River system in such quantity as to make sufficient mainstream water available for release to satisfy annual consumptive use of seven million five hundred thousand acre-feet in Arizona, California, and Nevada.

Section 601, 82 *Stat.* 899, 43 *U.S.C.* § 1551

(a) Nothing in this Act shall be construed to alter, amend, repeal, modify, or be in conflict with the provisions of the Colorado River Compact (45 Stat. 1057), the Upper Colorado River Basin Compact (63 Stat. 31), the Water

Treaty of 1944 with the United Mexican States (Treaty Series 994; 59 Stat. 1219), the decree entered by the Supreme Court of the United States in Arizona against California and others (376 U.S. 340), or, except as otherwise provided herein, the Boulder Canyon Project Act, the Boulder Canyon Project Adjustment Act, or the Colorado River Storage Project Act.

(b) The Secretary is directed to—

(1) make reports as to the annual consumptive uses and losses of water from the Colorado River system after each successive five-year period, beginning with the five-year period starting on October 1, 1970. Such reports shall include a detailed breakdown of the beneficial consumptive use of water on a State-by-State basis. Specific figures on quantities consumptively used from the major tributary streams flowing into the Colorado River shall also be included on a State-by-State basis. Such reports shall be prepared in consultation with the States of the lower basin individually and with the Upper Colorado River Commission, and shall be transmitted to the President, the Congress, and to the Governors of each State signatory to the Colorado River Compact; and

(2) condition all contracts for the delivery of water originating in the drainage basin of the Colorado River system upon the availability of water under the Colorado River Compact.

(c) All Federal officers and agencies are directed to comply with the applicable provisions of this Act, and of the laws, treaty, compacts, and decree referred to in subsection (a) of this section, in the storage and release of water from all reservoirs and in the operation and maintenance of all facilities in the Colorado River system under the jurisdiction and supervision of the Secretary, and in the operation and maintenance of all works which may be authorized hereafter for the augmentation of the water supply of the Colorado River system. In the event of failure of any such officer or agency to so comply, any affected State may maintain an action to enforce the provisions of this section in the Supreme Court of the United States and consent is given

to the joinder of the United States as a party in such suit or suits, as a defendant or otherwise.

Section 602, 82 *Stat.* 900, 43 *U.S.C.* § 1552

(a) In order to comply with and carry out the provisions of the Colorado River Compact, the Upper Colorado River Basin Compact, and the Mexican Water Treaty, the Secretary shall propose criteria for the coordinated long-range operation of the reservoirs constructed and operated under the authority of the Colorado River Storage Project Act, the Boulder Canyon Project Act, and the Boulder Canyon Project Adjustment Act. To effect in part the purposes expressed in this paragraph, the criteria shall make provision for the storage of water in storage units of the Colorado River storage project and releases of water from Lake Powell in the following listed order of priority:

(1) releases to supply one-half the deficiency described in article III(c) of the Colorado River Compact, if any such deficiency exists and is chargeable to the States of the Upper Division, but in any event such releases, if any, shall not be required in any year that the Secretary makes the determination and issues the proclamation specified in section 1512 of this title;

(2) releases to comply with article III(d) of the Colorado River Compact, less such quantities of water delivered into the Colorado River below Lee Ferry to the credit of the States of the Upper Division from other sources; and

(3) storage of water not required for the releases specified in clauses (1) and (2) of this subsection to the extent that the Secretary, after consultation with the Upper Colorado River Commission and representatives of the three Lower Division States and taking into consideration all relevant factors (including, but not limited to, historic stream-flows, the most critical period of record, and probabilities of water supply), shall find this to be reasonably necessary to assure deliveries under clauses (1) and (2) without impairment of annual consumptive uses in the upper basin pursuant

to the Colorado River Compact: *Provided*, That water not so required to be stored shall be released from Lake Powell: (i) to the extent it can be reasonably applied in the States of the Lower Division to the uses specified in article III(e) of the Colorado River Compact, but no such releases shall be made when the active storage in Lake Powell is less than the active storage in Lake Mead, (ii) to maintain, as nearly as practicable, active storage in Lake Mead equal to the active storage in Lake Powell, and (iii) to avoid anticipated spills from Lake Powell.

(b) Not later than January 1, 1970, the criteria proposed in accordance with the foregoing subsection (a) of this section shall be submitted to the Governors of the seven Colorado River Basin States and to such other parties and agencies as the Secretary may deem appropriate for their review and comment. After receipt of comments on the proposed criteria, but not later than July 1, 1970, the Secretary shall adopt appropriate criteria in accordance with this section and publish the same in the Federal Register. Beginning January 1, 1972, and yearly thereafter, the Secretary shall transmit to the Congress and to the Governors of the Colorado River Basin States a report describing the actual operation under the adopted criteria for the preceding compact water year and the projected operation for the current year. As a result of actual operating experience or unforeseen circumstances, the Secretary may thereafter modify the criteria to better achieve the purposes specified in subsection (a) of this section, but only after correspondence with the Governors of the seven Colorado River Basin States and appropriate consultation with such State representatives as each Governor may designate.

(c) Section 620f of this title shall be administered in accordance with the foregoing criteria.

The following Bill is one of eight proposed but unenacted amendments to the Colorado River Storage Project Act of 1956. These bills are important to decision of this matter:

93d CONGRESS

1st Session H. R. 6255

IN THE HOUSE OF REPRESENTATIVES

March 28, 1973

Mr. McKay introduced the following bill; which was referred to the Committee on Interior and Insular Affairs

A BILL

To amend the Colorado River Storage Project Act in order to remove the prohibition against constructing dams or reservoirs authorized in such Act within national parks or monuments.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the third section of the Act entitled "An Act to authorize the Secretary of the Interior to construct, operate, and maintain the Colorado River River storage project and participating projects, and for other purposes", approved April 11, 1956 (70 State. 105), is amended by striking out the following: "It is the intention of Congress that no dam or reservoir constructed under the authorization of this Act shall be within any national park or monument.